Volume I

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 86

UNITED STATES, APPELLANT,

vs.

THIRD NATIONAL BANK IN NASHVILLE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

FILED APRIL 11, 1967
PROBABLE JURISDICTION NOTED JUNE 12, 1967

(Pages 1 to 168)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 86

UNITED STATES, APPELLANT,

VS.

THIRD NATIONAL BANK IN NASHVILLE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

Volume I

INDEX

[fol. 1] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

Civil Action No. 3849

UNITED STATES OF AMERICA, Plaintiff,

v.

THIRD NATIONAL BANK IN NASHVILLE AND NASHVILLE BANK AND TRUST COMPANY, Defendants.

COMPLAINT—Filed August 10, 1964

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action to obtain equitable relief against the defendants named herein and complains and alleges as follows:

I. Jurisdiction and Venue

1. This complaint is filed and this action is instituted against the defendants named herein under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, and under Section 15 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 736, as amended, entitled "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes," commonly known as the Clayton Act, in order to prevent and restrain continuing violations by the defendants, as hereinafter alleged, of Section 1 of the Sherman Act and of Section 7 of the Clayton Act, 38 Stat. 731, as amended by the Act of Congress of December 29, 1950, c. 1184, 64 Stat. 1125.

2. Each of the defendants has its principal place of business, transacts business, and is found within the Middle District of Tennessee.

II. The Defendants

3. The Third National Bank in Nashville, hereinafter referred to as "Third National," is made a defendant [fol. 2] herein. It is a banking association organized under the laws of the United States with its principal place of business at Nashville, Tennessee.

4. The Nashville Bank and Trust Company, hereinafter referred to as "Nashville Bank," is made a defendant herein. It is a banking association organized under the laws of the State of Tennessee, with its principal place of business in Nashville, Tennessee.

III. Trade and Commerce

5. Commercial banks fill an essential and unique role in the Nation's economy. Most money payments are made through checks drawn against demand deposits, a function unique to commercial banks. Commercial banks also accept time deposits from various types of depositors and provide a wide variety of other financial services, including personal and corporate trust accounts, the collection of drafts, bills, and other commercial instruments; the acceptance of bills of exchange; the issuance of letters of credit; the sale of cashiers' checks; the purchase or sale of securities for customers; the sale of foreign exchange and the renting of safety deposit boxes.

6. Commercial banks, because of the importance of bank credit to business borrowers and their close relationship with many such borrowers, and because of their holdings of stock in trust accounts, have an important influence on competition in all branches of industry and commerce served by commercial banking.

7. Third National is the second largest commercial bank in the Nashville area in terms of assets. It conducts a general commercial banking business through 15 banking offices. All its offices are located within the boundaries of metropolitan Nashville which is coextensive with Davidson County. Tennessee law prohibits a bank from establishing branches in counties other than the one in which its head office is located. As of March 11, 1964, Third National had [fol. 3] total assets of $341,702,000, total deposits of $300,779,000 and total net loans and discounts of $188,229,000.

As of October 4, 1963 it held personal trust assets of $70,586,000 and corporate trust assets of $10,389,000.

8. Nashville Bank is the fourth largest commercial bank in metropolitan Nashville. It conducts a general commercial banking business through two banking offices, both located in metropolitan Nashville. As of March 11, 1964, Nashville Bank had total assets of $45,991,000, total deposits of $39,653,000 and total net loans and discounts of $22,769,000. As of November 3, 1963, it held personal trust assets of $80,500,000 and corporate trust assets of $2,827,000.

9. Commercial banking in the Nashville area is heavily concentrated. As of December 1963, the three largest banks in metropolitan Nashville accounted for more than 93 per cent of total deposits and loans held by all commercial banks. Third National ranked second among the three largest banks. Its share of commercial banking deposits was 33.8 per cent. Its share of commercial banking loans was about 35.6 per cent. As of the same date, Nashville Bank, in fourth place, had about 5.0 per cent of commercial banking deposits and 4.6 per cent of the loans in metropolitan Nashville. The remaining four banks, together, held less than 3% of the deposits and loans.

10. There is also a high degree of concentration in banking in the area composed of the home county of the defendant banks and the seven surrounding counties. In this eight-county area the three largest banks, all Nashville banks, held more than 82 per cent of the total commercial bank deposits and loans as of December, 1963. Third National was among the top banks, and accounted for about 29.7 per cent of this area's deposits and 32.3 [fol. 4] per cent of the loans. As of the same time, Nashville Bank was in fourth place, holding about 4.1 per cent of deposits and loans in the eight-county area.

11. As a result of the proposed merger of third National and Nashville Bank, as hereinafter alleged, and based on the above-stated percentages, Third National would control about 38.8 percent of deposits and 40.2 percent of the loans held by commercial banks in metropolitan Nashville. It would become nearly on a par with the present largest bank in deposits and substantially larger in loans. The three largest banks, including Third National, would hold about 98.1% of the deposits and 97.8% of the

loans. In the eight-county area, Third National would control about 33.8 percent of the deposits and 36.4 percent of the loans. The total accounted for by the three largest banks in the eight-county area would be raised to 86.8 percent of the area's deposits and 87.4 percent of the area's loans. Third National would also have the largest trust department in the Nashville area and in the eight-county area. The two largest banks would hold more than 75 per cent of the trust business in the Nashville area.

12. Third National and Nashville Bank compete with each other and with other commercial banks in the Nashville area. Each is a major commercial banking competitor in this area and there is significant competition between them.

13. Third National and Nashville Bank are each engaged in interstate commerce. Credits advanced to customers and checks drawn upon the banks have been regularly utilized to effect interstate transactions. Third National and Nashville Bank have regularly utilized interstate communications, to conduct banking business with customers and with other banks located in states other than Tennessee. The banks have sent deposits to or received deposits from banks or customers in states other than Tennessee.

[fol. 5] IV. Offenses Charged

14. Beginning sometime prior to March 12, 1964 and continuing thereafter up to and including the date of the filing of this complaint, defendants Third National and Nashville Bank have been engaged in an unlawful combination in unreasonable restraint of the above-described interstate trade and commerce in violation of Section 1 of the Sherman Act.

15. The unlawful combination has consisted of a continuing agreement, understanding and concert of action between the defendants Third National and Nashville Bank, the substantial terms of which have been and are that the defendants will carry out a plan of merger which will eliminate all competition between them. To carry out the combination in unreasonable restraint of the above-described interstate trade and commerce, the defendants have entered into a contract approved by the Boards of Directors of Third National and Nashville Bank on or about March

11, 1964, which, if carried out, will result in a merger of the two defendants and eliminate all competition between them in violation of Section 1 of the Sherman Act.

16. The effect of the merger of Nashville Bank into Third National may be substantially to lessen competition or to tend to create a monopoly in commercial banking in violation of Section 7 of the Clayton Act.

17. The offenses alleged in this complaint are continuing and will continue unless the relief hereinafter prayed for is granted.

V. Effects

18. The effects of the offenses charged in this complaint are, among others:

(a) Significant actual and potential competition between the defendant banks will be permanently eliminated;

(b) Competition generally in commercial banking in the Nashville area may be substantially lessened and a tendency to monopoly created.

[fol. 6] (c) Concentration in commercial banking in the Nashville area will be substantially increased.

(d) Nashville Bank will be eliminated as a separate and independent major competitive factor in commercial banking in the Nashville area.

Prayer

Wherefore, plaintiff prays:

1. That the Agreement to Merge described in Paragraph 15 be adjudged to be unlawful in violation of Section 1 of the Sherman Act and Section 7 of the Clayton Act.

2. That defendants Third National and Nashville Bank and all persons acting on their behalf be enjoined from carrying out the Agreement to Merge described in Paragraph 15 above or any similar plan or agreement, the effect of which would be to merge or consolidate said defendants.

3. That a preliminary injunction be issued against the defendants Third National and Nashville Bank preventing or restraining them from taking any further action to consummate the aforesaid agreement, or any similar agreement, understanding, or plan to merge or consolidate Third

National and Nashville Bank pending adjudication of the merits of this complaint.

4. That, in the event the aforesaid Agreement results in a merger of defendants, each defendant be required to divest itself of all shares of stock, assets, and other properties and business acquired by and through such merger. [fol. 7] 5. That plaintiff have such other and further relief as the Court may deem just and proper.

6. That plaintiff recover the costs of this action.

/s/ James L. Minicus, Attorney, Department of Justice.

/s/ Robert F. Kennedy, Attorney General. /s/ William H. Orrick, Jr., Assistant Attorney General. /s/ Donald F. Melchior, Attorney, Department of Justice. /s/ Kenneth Harwell, United States Attorney, Nashville, Tennessee.

[fol. 8] *Duly sworn to by jurat omitted in printing. James L. Minicus.*

[fol. 9] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

Civil Action No. 3849

ANSWER OF THIRD NATIONAL BANK IN NASHVILLE—Filed August 14, 1964

The Third National Bank in Nashville answers the Complaint filed in this cause and says:

I

The Banks involved here have been proceeding in accordance with the Banking Act of 1960 (United States Code Annotated, Title 12, Section 1828) which designates the Comptroller of the Currency as the named Government official with the power to approve or disapprove of mergers involving a national bank. In pertinent part the Act provides:

> "In granting or withholding consent under this subsection, the Comptroller, the Board, or the Corporation, as the case may be, shall consider the financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served, and whether or not its corporate powers are consistent with the purposes of this chapter. In the case of a merger, consolidation, acquisition of assets, or assumption of liabilities, the appropriate agency shall also take into consideration the effect of the transaction on competition (including any tendency toward monopoly), and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest. In the interests of uniform standards, before acting on a merger, consolidation, acquisition of assets, or assumption of lia-
> [fol. 10] bilities under this subsection, the agency (unless it finds that it must act immediately in order to prevent the probable failure of one of the banks in-

volved) shall request a report on the competitive factors involved from the Attorney General and the other two banking agencies referred to in this subsection (which report shall be furnished within thirty calendar days of the date on which it is requested."

The contract to merge, entered into by the Banks on March 12, 1964, was not a final and binding contract but was subject, and the contract so provided, to the approval of the Comptroller of the Currency. It was also subject to the approval of the stockholders of both Banks and this has been given without a dissenting vote.

II

Pursuant to the provisions of said Act, the Banks filed a formal application containing information prescribed by the Comptroller of the Currency, which with exhibits and appendices attached, consisted of more than 170 pages of material. A copy of the entire application filed by the Banks with the Comptroller is attached as Appendix A to this Answer and is made a part hereof. The Court's attention is particularly invited to pages 92 through 107 of the application as these pages deal with the effects of the proposed merger on competition. The Banks reaffirm here and now the contents of the application filed with the Comptroller, but in order to focus upon the main issues the "Summation" on pages 101 through 107 of the application is set forth as follows:

[fol. 11] Summation

Thus it will be seen in these various categories of competition the concentration in any one of them or in all of them combined will have no adverse effect on competition. On the contrary, this merger will intensify competition between Nashville's three largest banks, no one of which will have an unfair competitive advantage over the others. Historically, Nashville has been a city which enjoyed the benefits of vigorous banking rivalries. (See Exhibit No. 18.) Many a small and struggling businessman has been nursed into economic health and substantial size by one of the banks even though another competitor bank had doubted the wisdom of granting him credit. Such rivalries will, no doubt,

continue and if the three banks in this area continue their struggle to outstrip one another, the public will be the beneficiary, and the counterbalancing of power will be particularly apparent in the rivalry between the First American National Bank and the resulting Third National Bank in Nashville which will have more nearly equal total resources. The next largest, Commerce Union Bank, with its strategically placed branches will not be at any disadvantage.

The proposed merger is not contrary to any of the principles laid down by our courts in the case of U. S. v. Philadelphia National Bank, 83 S. Ct., 1715, and U. S. v. First National Bank and Trust Company, et al of Lexington, Kentucky, — S. Ct., —. The test laid down in the Lexington case "where merging companies are major competitive factors in a relevant market" clearly does not apply here because the merging bank, the Nashville Bank and Trust Company, cannot be described in any sense as a "major competitive factor." Additionally, as a second distinguishing factor its problems place it in a category where the "business necessity doctrine" should apply. As was so wisely stated by Mr. Justice Brennan in a footnote on the last page of the opinion in the Philadelphia Bank case,

> "—the so-called failing company defense, see International Shoe Co. v. Federal Trade Comm'n, 280 U. S. 291, 299-303, 50 S. Ct. 89, 91-93, 74 L.Ed. 431, might have *somewhat larger contours* * as applied to bank mergers because of the greater public impact of a bank failure compared with ordinary business failures."

[fol. 12] Justification of this merger does not depend alone upon either of these distinctions. In the final analysis, the merger is justified because it will have a net pro-competitive effect. Far from tending to substantially lessen competition, it will intensify competition by providing a counterbalancing power to the number one bank and by spreading the effective use of the merging bank's capital throughout a well branched and well managed system where it will have the greatest benefit to the consumer.

For convenience, a brief study contrasting the instant case with Philadelphia and Lexington follows:

---

* Italics ours.

[fol. 13]

Legal Comparisons

Nashville	Philadelphia	Lexington
1. There are three major competitive banks in the Nashville area. After consolidation there will still be three. The relative rank of these banks will remain unchanged. The healthy competition will be heightened and intensified by the balance of power.	1. There were five major competitive banks in the Philadelphia area. Banks number two and four proposed a merger which would have resulted in a change in rank to number one. The resulting number one bank would have been dominant in absolute and relative terms with the second bank only about 60% as large as resulting bank number one. In short, there would have been a change away from the balance in which healthy competition actually existed.	1. There were six major competitive banks in the Lexington area. After the merger, there were five. The number one bank had gone from two times as large as the number two bank to approximately three times as large. Moreover, this increase in dominance of the number one bank had been produced by eliminating the number four bank, a major competitive influence. The resulting number one bank was larger than all its competition combined.
2. The number two bank has never in its history been a participant in merger or consolidation. The merging bank has not been the party to a consolidation or merger since 1933 when it absorbed a department of the number one bank during the depression because of the exigencies of the times. Thus both the number two bank and the other bank proposed to be merged come with antitrust clean hands. Furthermore, the number three bank and the number one bank in Nashville have been participants in more recent mergers than the other bank.	2. The Philadelphia National had acquired nine formerly independent banks and the Girard six. Neither bank had anti-trust clean hands. These acquisitions extended over a long period of time into the recent past.	2. The First National Bank has had impressive growth achieved in part by merger prior to 1929.
3. The business justifications for the proposed merger are compelling: (a) The merging bank has only one branch in a competitive market where branching is essential to survival. (b) The merging bank has depended on one family's interests for an estimated 30% of its business. He has now sold the controlling stock and resigned. (c) The merging bank has an inadequate reserve of management, inadequate recruitment program, inadequate salary scale, inadequate pension and welfare plan, non-Competitive bookkeeping system, inadequate new business department, inadequate check clearing, no credit department, investment department, or correspondent banking department, and no modern automation. It is not a member of the Federal Reserve System. More than merely a business purpose case, the Nashville case is one in which the necessity doctrine should be applied. (d) Substantial savings will result by combined bookkeeping departments. (e) Many older employees of merging bank will soon retire and bank has no funded pension plan. This can best be provided by charter bank.	3. There were no acceptable business justifications for the merger. The court did, however, in footnote 46 allude to the business necessity or failing business doctrine as being a question *not* presented in the Philadelphia case.	3. Although the court found an absence of "predatory" purpose, it did cite testimony from three of the remaining four banks to the effect that the consolidation would "seriously affect their ability to compete effectively over the years." Even the District Court's opinion was cast in terms of "lawful program of expansion" rather than positive business reasons relating to the needs of the institutions or the inability of one of them to compete successfully. The District Court's opinion indeed negates business necessity as a motive in the merger and emphasizes that both banks had good management.

Nashville	Philadelphia	Lexington
[fol. 14]		
4. The hallmark of modern banking is branch competition. While the number one bank has mushroomed into twenty banking offices (Including two under construction), the number two into fifteen, and the number three into twelve in the county and eight outside the county, the other bank has succeeded in opening but one branch office. Moreover, this branch is not on same line of traffic to any competing branch. First American's history reflected twelve merger consolidation take-overs.	4. The Philadelphia case Specifically found no branching problem with respect to the banks proposed to be merged. In fact, Philadelphia National Bank had twenty-seven offices and Girard had thirty-nine. These offices had considerable branch banking competitive overlaps, the balance of which would have been destroyed by the merger.	4. The Lexington case involved consolidation of the number one bank with four offices with the number four bank with two offices. Clearly, neither of the banks was suffering from a severe lack of branching activity. Furthermore, both number one bank and number four bank had pending applications for branches in locations competitive to one another.
5. In Nashville, there has been no decline in the number of banks since 1950. The merger of the Commerce Union in Nashville with its majority owned subsidiary was offset by the entrance of the charter of a new bank in 1960. Furthermore, the deposits and assets of the newly chartered bank has risen very rapidly since its entry into the field.	5. Philadelphia had thirty-three commercial banks in 1950 and only fourteen in 1960. Furthermore, the number of commercial banks with headquarters in four county areas fell from one hundred eight in 1947 to forty-two in 1960. A substantial portion of this decline was brought about by the acquisition of the Philadelphia National Bank of eighteen offices by merger since 1950 and by the acquisition by the Girard of thirty-two offices since 1950.	

Nashville	Philadelphia	Lexington
[fol. 15]		
6. There is nothing in the Nashville situation to indicate that this merger would beget other mergers.	6. Another application to merger by two banks in the Philadelphia area gave as a reason that smaller banks were compelled to merge in order to compete.	6. Presidents of three banks testified that this merger would cause them to give serious consideration to further mergers.
7. In Nashville, the merging bank is not a part of the banking competition which exists between Nashville's three largest banks and which characterizes the market. To use language from the Brown Shoe Co. case, it is certianly not a "meaningful competitor".	7. In Philadelphia the merging banks were "major competitors".	7. In Lexington the banks were active competitors of *major* importance.
8. In Nashville the change in ownership of two out of fifty banking offices will bring increased services to many and injury to none.	8. In Philadelphia injury to existing customers was foreseen by the narrowing of available choices.	8. In Lexington "control" by the resulting bank of two of the city's newspapers and 60% of downtown real estate points toward excess power potentially injurious to many.
9. The number of banks in Nashville has not declined. Commerce Union acquired its subsidiary, Broadway National, in 1962. A new bank, Capital City Bank, was organized in 1960.	9. In ten years from 1950 to 1960, the number of commercial banks has been reduced by 61%.	9. No new bank has been established in county since 1938.
10. Nashville is a regional banking center serving the Central South.		10. Lexington was referred to as an "isolated community".

[fol. 16] Seven Statutory Criteria

1. Corporate powers.

The corporate powers of the proposed consolidated bank will be consistent with the purposes of all National Banking Acts and related statutes. The merging bank is now a state bank and not supervised by the Federal Reserve System. Thus, with respect to the first criteria, it is desirable to approve the consolidation.

2. Adequacy of the proposed consolidated bank's capital structure.

The increased and completely adequate capital structure of the consolidated bank will enable it to provide even more services for its customers and will redound to the benefit of small borrowers by spreading the effective use of this consolidated structure throughout the branch system with which these small borrowers primarily do business.

3. The general character of its management.

The consolidated bank will have excellent management whereas the merging bank has critical management problems. Thus, from a public service standpoint and management standpoint, approval of the consolidation is imperative.

4. Future earnings prospects.

The future earnings prospects of the consolidated bank are excellent because of its existing branching system, excellent management, automated facilities, and national image whereas the future earning prospects of the merging bank are in extremely grave doubt because of its management crisis, its lack of branching, its antiquated banking facilities, and its strictly local nature.

5. The effect of the consolidation upon competition.

The lack of branching and other outmoded policies of the merging bank have prevented its effectiveness as a meaningful competitor in the area in which the consolidated bank will operate. A large percentage of the merging

bank's business has come from customers whose business is related in some way to the interest of the former major stockholder. The sale of the controlling interest in the merging bank by this stockholder will further impede its efforts. The consolidated bank, which will still be the number two bank in rank in Nashville, will be more nearly equal in size and in branches to the number one bank as a result of the merger and will, therefore, present a countervailing power which will intensify competition.

6. The financial history and condition and the tendency toward monopoly.

The charter bank has never in its history engaged in any merger, consolidation, or take-over. The merging bank has not done so since business necessity required a merger with a department of another bank during the early part of the depression. For more than thirty years there has been no tendency in the community toward mergers and consolidations. The merger of Broadway National Bank into Commerce Union Bank which already owned more than 80% of the capital stock is one which did not alter the competitive situation.

[fol. 17] 7. Convenience and needs of the community to be served.

The community should reap the benefit of the competitive facility which the consolidation adds to the market. Further, the area as a whole in which the charter bank is now so tremendously active will have substantially improved prospects as a result of the expanded capacity resulting from the consolidation.

[fol. 18] III

After acting pursuant to the language of the statute and after receiving reports from three other government agencies, and in consideration of the seven statutory criteria which included the effect of the transaction on competition, the Comptroller of the Currency found that the proposal to merge the two Banks involved here was a transaction "in the public interest"; and the Comptroller rendered an opinion dated August 4, 1964 which approved the merger. The entire opinion of the Comptroller, consisting

of five pages, is attached to this Answer as Appendix B and is made a part hereof.

IV

The Complaint filed by the Attorney General makes no mention of the findings of fact contained in the Comptroller's opinion and apparently treats the Banking Act of 1960 as if it were a nullity.

V

Certain highlights from the opinion of the Comptroller are quoted as follows:

"The present owners of the bank show no intention of instituting costly reforms to attract employees capable of making the bank a vigorous competitor, responsive to the needs of the community. As a result, the merging bank is presently non-competitive. Only through merger with the charter bank, where the resulting bank will be a National Bank, will this Office have an opportunity to assist this non-competitive state-chartered institution as well as the people of the Nashville community. We would, indeed, be derelict in our responsibilities to protect the public interest in banking were we to impede effective management from assuming the responsibilities of a declining and leaderless merging bank."——

"Only minimal competition exists between the two aplicant banks due to difference in size and to diversity of market interests."——

"While the cold statistics presented by the application may indicate at first blush that some competition now exists between the applicants and that it will be eliminated by this merger, closer analysis of the com- [fol. 19] plete picture dispels this hasty conclusion.— When, as in this case, we find that the management of the merging bank is more interested in insurance than in banking, has no desire to maintain the bank's relative standing in the banking community, and has made no effort to improve its internal operating procedures nor elevate the morale of its personnel through better salaries and an improved pension plan, we cannot realistically view it as a competitive bank. When a

bank, such as the merging bank, is not disposed to compete, it is idle to speak of the elimination of competition by reason of a merger."

The opinion of the Comptroller further indicates that Mr. M. A. Bryan, Superintendent of Banks, State of Tennessee, has expressed a similar opinion which is quoted by the Comptroller.

VI

Returning now to the particulars of the Complaint, Section II entitled "The Defendants" correctly describes the two Banks but the entire remainder of the Complaint must be challenged.

Paragraphs 5 and 6 of Section III entitled "Trade and Commerce" contain, so far as they go, a substantially correct description of the manner in which commercial banks operate but these paragraphs are incomplete and attempt to oversimplify a description of commercial banking and its influence on the economy. For example, paragraph 6 indicates that because of the holdings of commercial banks of stock in trust accounts they have an important influence on competition in all branches of industry and commerce. This statement may be true in some instances and with regard to some banks, but it is not necessarily true for all banks because many wills and trusts provide for the beneficiaries to exercise voting rights over the stocks held in trust accounts and in many agency type trust accounts the bank is a mere custodian and the owner of the funds directs the manner in which the stocks are voted. It is therefore denied that the allegations of Sections V and VI should be made the basis of any legal conclusions or decisions to be reached in this lawsuit.

[fol. 20] Paragraphs 7, 8, 9, 10, and 11 of Section III contain the Plaintiff's version of cold statistics. Some of these cold statistics may have been taken from the application filed by the Banks and to that extent such statistics, taken out of context, may be correct, but when used as they are in the Complaint, they are misleading and unreliable. The manner in which the Complaint uses cold statistics denies the application of common sense which is necessary to solve any problem involving human relationships and the welfare of people. For example, it is misleading to

compare loan totals without indicating how much of the loan totals originate outside of the Nashville area. It is also unrealistic to compare totals and percentages of deposits of commercial banks alone without considering the vast growth in recent years of savings and loan associations, insurance companies, credit unions, pension funds, foundations, and finance companies, all of which vigorously compete with banks for either or both of the savings dollar or the loan requirements of the public.

The Government attempts to make much of the combined percentages of deposits and loans held by Nashville's three largest banks. This approach, based upon a narrow and misleading use of cold statistics, overlooks many important factors. The first is that a high degree of competition exists between Nashville's three largest banks and that this competition will be intensified by the proposed merger so that the net effect of the merger will be to increase rather than to diminish competition among the Nashville banks.

It is also interesting to note that in many of the larger cities of this region the three largest banks have between them similar percentages of banking totals. For example, the three largest banks in Atlanta have 86%, in Birmingham 99.42%, in Chattanooga 100%, in Memphis 96%, Knoxville 87%, and in Jackson, Mississippi 100%. Thus the Plaintiff is completely wrong when it refers to Nashville as a city with a high degree of concentration, because it is certainly not high when compared to others. The word [fol. 21] "high" becomes meaningless unless compared to something.

VII

Third National Bank demurs to the Government's statement that it would have the largest Trust Department in the Nashville area. Details of trust accounts held by banks are considered confidential and one bank is unlikely to be able to find out the totals of trust assets held by a competitor. Even if known, the totals of trust assets might be misleading and the figures could be misused unless they were analyzed and separated to distinguish between those for which the bank acts as a mere custodian and those for which voting or other economic controls are involved.

Trust business is merely an incidental part of full service banking. In many cases trust services are not profitable

and are rendered for the purpose of accommodating the needs of customers. Trust business would account for only a very small part of the income of the two Banks. During 1963 the trust business produced only 2.2% of the gross income of the Third National Bank and 10.15% of the gross income of the Nashville Bank and Trust Company. For the two combined, total income during 1963 would have been only 3.48% of gross income.

VIII

The allegation in the Complaint that each Bank is a major competitor and that there is significant competition between them is clearly an erroneous, unjustified and self-serving conclusion of the pleader. It deserves to be rejected as being an utter contradiction to the statements in the carefully studied opinion of the Comptroller of the Currency, who is the Government official especially designated by the Congress to determine these matters and who found that competition between these two Banks was minimal.

[fol. 22]

IX

It is true that the check clearing and collection functions of banks involve transactions in interstate commerce, but it is denied that the effect of the proposed merger may be substantially to lessen competition or tend to create a monopoly in any line of commerce in such manner as to violate Section 7 of the Clayton Act, or that the proposed merger will have a substantial adverse effect upon interstate commerce in such manner as to violate Section 1 of the Sherman Act.

X

Section IV of the Complaint entitled "Offenses", and Section V of the Complaint entitled "Effects" are both based upon mere conclusions of the pleader and both are denied in toto. All other allegations of the Complaint not herein specifically admitted or denied are likewise denied.

XI

Wherefore, it is denied that the Plaintiff is entitled to the relief prayed for against it or to any other relief and prays that judgment be entered dismissing the Complaint, that the costs be taxed to the Plaintiff; and also this Defendant pleads:

Defenses to the Motion

The prayer and motion for a temporary injunction to halt the proposed Bank merger should be overruled because:

1. The harm and damage which would immediately result from the granting of such a temporary injunction would far outweigh the nebulous and speculative claims of the Plaintiff.

2. The climate and atmosphere created in the Nashville [fol. 23] community by the release and publication of the opinion of the Comptroller and by the filing of this Complaint with attendant publicity has intensified the multiple problems faced by the Nashville Bank and Trust Company.

3. The status quo is already destroyed. With uncertainty, confidence slips away day by day. The only antidote for the poison of uncertainty is to complete the merger within a few days.

4. With a temporary injunction in effect the Nashville Bank and Trust Company will be subjected to intensified efforts to entice away its customers and its employees and that very uncertainty and confusion about the future which brought about these problems will leave the management powerless to combat them.

5. To ask the Court to grant a temporary injunction on the present record is to ask it to disregard the considered conclusions of the statutory officer charged with the specific duty of evaluating bank mergers, whose decision was made after long deliberations.

6. The damage done by an injunction will be irreparable, immediate and certain; and amount to a final destruction of the rights and property of the stockholders of the Banks, without any redress in damages, if the Comptroller ultimately decides that the injunction should not stand; on the other hand, absent an injunction, the Plaintiff will still retain its remedy of divestiture in the event its position

should finally be sustained. Although the remedy of divestiture is not without problems, they are the problems of tomorrow which may never occur; and those problems are much less serious for these Banks than the problems of today. The damage done by a temporary injunction can never be undone, and will in practical effect be a final adjudication without a full hearing; whereas, no serious [fol. 24] and permanent injury can result to the public interest by delaying any injunction until after a full and final hearing.

7. An injunction will once and for all seriously damage the future of the Nashville Bank and Trust Company. Other similar cases have required two to three years before a Supreme Court decision finally disposed of the matter. This Bank cannot hope to retain the status quo, either with its customers or its employees during such a period of increased uncertainty.

8. A victory for the Banks at the end of such litigation while an injunction stays in effect will likely be a hollow one because by that time the smaller Bank will likely be a mere shadow of the Bank which exists today.

9. Granting the Plaintiff's motion would harm the very patient it seeks to help because the ability of the Nashville Bank and Trust Company to serve the public will be diminished and the customers of the Nashville Bank and Trust Company will be deprived of the benefits and conveniences of branch banking and other increased services offered by Third National Bank.

Wherefore, Defendant prays that the prayer for a temporary injunction be overruled.

Attorneys for Third National Bank in Nashville, Farris, Evans & Evans, 710 Third National Bank Building, Nashville, Tennessee 37219. By Frank M. Farris, Jr. Hooker, Hooker & Willis, 214 Union Street, Nashville, Tennessee. By John J. Hooker, Jr.

[fol. 25] *Duly sworn to by Sam M. Fleming, jurat omitted in printing.*

Certificate of service omitted in printing.

[fol. 26] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

Civil Action No. 3849

[Title omitted]

ANSWER OF NASHVILLE BANK AND TRUST COMPANY—Filed August 14, 1964

Nashville Bank and Trust Company, for answer to the Complaint filed herein against it and another, says:

I

This defendant admits that it is a banking association organized under the laws of the State of Tennessee, with its principal place of business in Nashville, Tennessee, within the Middle District of Tennessee.

II

It denies that it has committed any act in violation of the Acts of Congress cited in Section I of the Complaint and in particular, it denies that it has committed any act in violation of Section IV of the "Sherman Act" or of Section 1 or Section 7 of the "Clayton Act," cited in said Section of the Complaint.

III

It is admitted that this defendant, pursuant to the appropriate statutes and regulations made and provided, has been proceeding to enter into a merger with the Third National Bank in Nashville.

IV

Said merger has been approved by the Comptroller of [fol. 27] the Currency—United States Treasury Department of the United States of America, this being the agency of the United States Government charged with the respon-

sibility of reviewing and passing judgment upon such applications to merge.

V

This defendant refers to the Answer being filed herein by its co-defendant, Third National in Bank in Nashville, and herewith and hereby adopts the averments contained in said Answer as being correct and appropriate as and for its answer to the Complaint filed herein by still another agency of the United States Government, to-wit, the Department of Justice. This defendant, therefore, hereby incorporates the said Answer of Third National Bank in Nashville and the exhibits and appendices thereto by reference as a part of this the Answer of Nashville Bank and Trust Company.

VI

Defendant further attaches hereto as Exhibit 1 to this its answer the affidavit of W. S. Hackworth, its President and chief executive officer, who is also a substantial stockholder in Nashville Bank and Trust Company.

Defendant further attaches hereto as Exhibit 2 to this its answer the affidavit of William C. Weaver, Jr., a substantial stockholder of the Nashville Bank and Trust Company.

VII

This defendant avers that, as shown by the facts and circumstances set forth in said affidavits, supplementing the facts and circumstances contained in the Answer, appendices and exhibits of Third National Bank in Nashville, the opinion of the Comptroller of the Currency, the governmental officer and agency charged with responsibility in this area, approving the merger should be sus- [fol. 28] tained, the record being filed herewith, including the Answers, appendices and exhibits, constituting a preponderant quantity of relevant facts in support of the findings, opinion and decision of the Comptroller.

VIII

This defendant further avers that in so far as its own relationship to the merger is concerned, and as shown by the entire record before the Court at this time, it is a matter

of business necessity that the merger as approved by the Comptroller should be sustained. Further, this defendant believes and avers that the merger is in the public interest of the people of Nashville and of the residents of this area of the Central South.

IX

In light of the fact that this answer is being filed to be read and considered upon an application for a temporary injunction by the other agency of the United States Government, the Department of Justice, this defendant avers that such application for temporary injunction should not be granted and that to grant any such temporary injunction would work irreparable harm and injury upon this defendant, with no resulting proper and equitable benefit to the plaintiff, Department of Justice. This defendant avers that in any weighing of the equities in consideration of the extraordinary injunctive relief being sought, the equities weigh heavily in favor of this defendant and in favor of the denial of such request for a temporary injunction.

X

Defendant further denies that the plaintiff is entitled to a permanent injunction, or to a divestiture, or to any of the relief sought.

[fol. 29] This defendant denies that it has committed any of the offenses charged in the manner averred in Section IV of the Complaint or that any of such alleged offenses will result in the effects charged in Section V of the Complaint.

XI

Where not otherwise expressly admitted or denied, this defendant denies the averments of fact and the legal conclusions set forth in the Complaint and in so far as its interests are concerned, it demands strict proof of each and every averment which would or might support the prayers for relief as contained in said Complaint. Defendant denies that the plaintiff is entitled to any part of the relief thus prayed for by it.

Wherefore, this defendant prays that the prayer for a temporary injunction be denied, and further prays that the Complaint be dismissed.

Edwin F. Hunt, 700 American Trust Building, Nashville, Tennessee 37201. Reber Boult, 700 American Trust Building, Nashville, Tennesse 37201, Attorneys for Nashville Bank and Trust Company.

[fol. 30] *Duly sworn to by W. S. Hackworth, jurat omitted in printing.*

Certificate of service omitted in printing.

[fol. 31] EXHIBIT 1 TO ANSWER OF NASHVILLE BANK AND TRUST COMPANY

Affidavit

STATE OF TENNESSEE,
County of Davidson:

The undersigned, W. S. Hackworth, having first been duly sworn, deposes and says:

1. That he is and has been for more than eight years the duly elected and serving President of Nashville Bank and Trust Company.

2. That he and members of his staff compiled the information pertaining to Nashville Bank and Trust Company contained in the application to merge the said Bank into the Third National Bank in Nashville, and which application was filed with the Comptroller of the Currency.

3. That all of the information and all of the facts contained in the said application to merge and pertaining to the Nashville Bank and Trust Company are true, and if based upon opinion or belief, he verily believes them to be true.

4. That on or about June 16, 1964, he wrote a letter addressed to the Comptroller of the Currency which was filed as supplementary material to be considered along with the said application to merge. All the facts and information contained in that letter are true and all opinions and beliefs contained therein are verily believed to be true. Copy of said letter is attached hereto and made a part hereof as Exhibit "A" to this affidavit.

5. That in his opinion irreparable harm will result to Nashville Bank and Trust Company and its employees if the proposed merger with Third National Bank in Nashville is not completed. Many of the reasons why this irreparable harm will result are set forth in the application and in the above letter attached hereto as an exhibit. In addition to these reasons, affiant mentions the following to be especially considered:

(a) The Chairman of the Board of Nashville Bank and Trust Company resigned shortly after H. G. Hill Company sold its stock in said Bank, stating he desired to devote his full time to H. G. Hill Company.

(b) Affiant's present age is 68 years and he desires to retire within the next two years.

(c) Since the application for merger was filed and since affiant wrote his letter above exhibited, his health has become impaired. He is under the care of three physicians and he daily visits one of these physicians for treatments each morning.

(d) The average age of the other officers of Nashville Bank and Trust Company is high.

[fol. 32] (e) So long as the pending merger is in prospect and at the same time in litigation, it is practically impossible for the merging bank to attract new officers or new officer material. There is even increased and grave difficulty in retaining some of Nashville Bank and Trust Company's key personnel to whom attractive offers from other banks have been made and other such offers may be anticipated.

(f) Nashville Bank and Trust Company is not a sufficiently large bank to have managerial depth. Every chief executive of a corporation, including especially a bank in a metropolitan area, wants and attempts to have not only an able and experienced officer in every important position, but also to have an able and trained person prepared to take over if the key officer be removed from his position by promotion, resignation or otherwise. It is difficult for a relatively small bank to handle this problem at best, and it is one impossible of handling when uncertainty hangs over the merging bank.

(g) It is practically impossible for a merging bank to compete successfully for new business while the merger is pending, and it would be an even worse state of competition to attempt the same while the merger was under temporary injunction. Even normal attrition of deposits and loans, unless counterbalanced by successful solicitation of new business, will cause a bank operating under handicaps as does Nashville Bank and Trust Company, to decline and retrogress.

(h) Nashville Bank and Trust Company has lacked and now lacks the resources to attract and to hold a sufficient number of young and aggressive officer personnel to compete effectively.

(i) Modern banking in a metropolitan area requires

automation in order to be successful and to meet competition. The cost of automation for a bank the size of Nashville Bank and Trust Company is virtually prohibitive because only a larger bank renders economical and practicable the substantial outlay of funds necessary for automation. Nashville Bank and Trust Company at the present time is not sufficiently large to justify automation, and affiant does not believe it can become sufficiently large by prospects of growth in the reasonably foreseeable future.

(j) Nashville Bank and Trust Company has only one small branch bank. The difficulties of obtaining additional locations and the original cost of the same, plus maintenance cost during the period when such new branch cannot be expected to be remunerative, render it impractical if not impossible for Nashville Bank and Trust Company to establish such additional branches with the resources now available to it or reasonably foreseeable.

(k) As an added complication upon the question of retention of present key personnel, or the addition of new and capable personnel, is the fact that the Nash- [fol. 33] ville Bank and Trust Company only recently, in 1961, adopted any kind of a pension plan, this particular plan only providing that certain benefits to retired employees were to be paid out of current earnings. This plan is totally unfunded and the cost of funding on an actuarially sound basis would be very expensive and would represent a heavy charge against future earnings.

Also, it is a fact that the general employee welfare fringe benefit provisions have been recognized to be inadequate for sometime.

6. The earnings of Nashville Bank and Trust Company in the immediate past have been satisfactory. However, if the Nashville Bank and Trust Company made the expenditures necessary to bring it into a position to compete successfully and substantially in the Nashville area banking industry, such as additional branch banks, increased salary scale, automation, funded pension plan, employee welfare benefits and other related modern banking methods and procedures which have come to be necessary in order

to render adequate and modern service to the public, it is certain that its pattern of satisfactory earnings could not be maintained and such earnings might very well disappear.

7. The facts and reasons above stated, coupled with others specified in affiant's letter attached as an exhibit hereto, are the bases for affiant's statement that the merger of Nashville Bank and Trust Company into the Third National Bank in Nashville is a business necessity.

8. In addition, in the opinion of affiant, this merger is not only in the best interest of Nashville Bank and Trust Company as a business necessity, but also is in the public interest in the area of affording modern banking services which would be truly competitive in the Nashville area and in the regional area served by the Nashville banks, which could not be accomplished by Nashville Bank and Trust Company separately.

9. In the opinion of affiant, if this merger is prevented, the future of the Bank is speculative and the group of persons owning the majority of its stock may sell the same to other persons without banking experience or to non-residents, and in either event the result would be most harmful to this bank, its employees, its customers and would also be detrimental to the Nashville community.

Executed this 13th day of August, 1964.

W. S. Hackworth.

Sworn to and subscribed before me, on this the 13th day of August, 1964.

Josephine H. McGinness, Notary Public.

My commission expires: 5-5-68.

[fol. 34] EXHIBIT "A" TO AFFIDAVIT OF W. S. HACKWORTH

June 16, 1964.

Mr. James J. Saxon
Comptroller of Currency
United States Treasury Department
Washington, D. C.

Dear Sir:

I have been requested to state the reason why I consider the merger of the Nashville Bank and Trust Company into the Third National Bank in Nashville to be a business necessity.

While the Nashville Bank and Trust Company has enjoyed a measure of success during the last eight years, it is operating under severe handicaps. To understand the difficulties, one must be aware of the intensely competitive situation that exists among the banks in Nashville. To illustrate: the management of the Nashville Bank and Trust Company a few years ago recognized that, with the large number of existing branch banks, it was essential to its welfare to establish a number of its own throughout the heavily populated suburban districts of Davidson County. For a branch bank to succeed, you have to first secure a good location. That is most difficult due to the fact that the larger banks now have the county covered with 45 banking offices. Without a proportionate number of such facilities, the Nashville Bank and Trust Company is doomed to reach a plateau and probably start backward as more and more people transact their business in the suburban areas and seldom come to the central part of the city. The bank has a splendid and convenient parking garage which was constructed at a large cost and it has helped us to hold a part of our business. But our best friends tell us very frankly that they would like to bank with us but simply are not going to fight the traffic in and out of the city in order to do so. I could name at least a hundred of our friends who feel this way and other officers of this bank have encountered the same experience. Statements from three of them are attached, marked "Exhibit No. 1." I consider the lack of these branches as the No. 1 handicap of the Nashville Bank and Trust Company and

it can best be overcome through a merger with the Third National Bank, which has 14 branches, as the merger will [fol. 35] enable us to furnish our friends with convenient banking offices at 17 locations, counting the main offices. There is not only the question of the initial cost of establishing new branches, but it is a known fact that such branches operate at a loss several years while waiting to grow large enough to break even. We simply do not have the resources and manpower to do this on a scale sufficiently large to make ourselves competitive.

When the Hill interests sold the controlling stock of the Nashville Bank and Trust Company to the Weaver Group in January of this year, the morale of the officers and employes of this bank was considerably disturbed. The uncertain future upset practically everyone. Doubt as to whether the Weaver Group would move in or sell and, if it sold, to whom, was not a climate that would inspire the best efforts of employes and officers, and most certainly would make difficult the attraction of new personnel. To illustrate the personnel problem and the severe competitive situation during this time, I should like to give one outstanding example, namely, Mr. K. O. Primm, who in 1956 was a clerk in the Trust Department of this bank. Soon after becoming president, I recognized that he had ability beyond his assignments and that he was especially gifted in public relations and in securing new business. He was assigned to our Business Development Department, made an Assistant Vice President, and later a Vice President. During the time of the negotiations with the Weaver Group, the First American National Bank offered him a position as Vice President at a salary which we could not meet without disrupting our entire officers' salary structure. Although no one can be censured for accepting a higher salaried position, there is little doubt that the First American, the largest bank in Nashville, hired him for the purpose of taking business away from our smaller bank. Mr. Primm was an effective solicitor and, since he was familiar with the Nashville Bank and Trust Company's accounts, he has made considerable headway in moving accounts to the First American National Bank.

With further reference to the competitive problem, several weeks after selling the controlling stock of the H. G. Hill Company to the Weaver Group, Mr. H. G. Hill, Jr., Presi-

dent, and Mr. L. P. Thweatt, Executive Vice President of the H. G. Hill Company, resigned from the Board of Directors of this bank, and this further gave our competitors an excuse for soliciting large food and related food accounts which had long been doing business with this bank because of the Hill Company.

Among the younger personnel, many banks are attempting to hire them at higher salaries than we are paying. They are no doubt remaining on the job awaiting the outcome of the merger so that they can more accurately gauge their future.

[fol. 36] In the face of the resignation of the directors and the departure of Mr. Primm, we were confronted with concerted efforts on the part of the First American National Bank and the Commerce Union Bank, both of which sent out teams of officers to call on our customers and entice them away from us. These competitors have told our customers that we literally cannot compete for a fair share of the banking business in Nashville, using such arguments that their banks could give customers larger lines of credit and even questioning whether our present lines to them could be continued. We have worked to overcome these adverse influences in every way, but we have lost many valuable customers. A check of our accounts since the proposed merger was announced shows that we lost 84 substantial accounts totalling $682,000.00. In addition to these losses, 63 large accounts were surveyed and show a decrease in average balances in the amount of $1,800,000.00. It is natural to assume that some of this will return, but we know a substantial part is a result of firms splitting their bank accounts.

In our Trust Department, we have also felt the effect of our competitors' activities, as evidenced by Exhibit No. 3 attached hereto.

Third National Bank has assured all Nashville Bank and Trust Company employees of equitable treatment, which has been especially helpful in enabling us to hold our employes. A schedule, showing a breakdown of our officers' ages, titles and salaries is attached to this letter, marked "Exhibit No. 2." We have lacked the resources to attract and hold a sufficient number of young and aggressive officer personnel needed in order for the bank to effectively compete. This is particularly true in that we are

not large enough to offer training programs for young college graduates interested in the banking profession.

Judging from the above, there is no doubt that the best interests of the public and all concerned would result from the merger of the banks and, for this reason, it is my opinion that the merger should not be long delayed. If it is, it will tend to further create doubt and apprehension in the minds of depositors, borrowers, employes and the public. Naturally we would struggle to overcome these problems, but the harm resulting from the failure of the merger is not likely to be repaired for a long, long time, if at all.

Yours very truly, ——, ——, President.

[fol. 37] EXHIBIT 2 TO ANSWER OF NASHVILLE BANK AND TRUST COMPANY

Affidavit

STATE OF TENNESSEE,
County of Davidson:

The undersigned, William C. Weaver, Jr., having first been duly sworn, deposes and says:

1. That he is a resident of Nashville, Davidson County, Tennessee and is at the present time the Senior Vice President-Finance of The National Life and Accident Insurance Company, with its home office in Nashville, Tennessee. As of December 31, 1963, this company had assets of $1,105,446,047.28 and had life insurance in force of $7,046,186,163.00. It ranked 18th in life insurance in force among the life insurance companies in the United States. It has a home office working force of more than 1800 and a field force numbering in excess of 8700.

2. Acting as the nominee for a group of other principals, affiant negotiated for the purchase of the controlling common stock interest in the Nashville Bank and Trust Company from the H. G. Hill Company and W. S. Hackworth, evidenced by a letter agreement dated January 11, 1964, as accepted on January 14, 1964. Affiant was requested to and did prepare a letter to be filed with the Comptroller of the Currency in support of the then pending application to merge the Third National Bank in Nashville and Nashville Bank and Trust Company, this letter being dated June 15, 1964 and addressed to Mr. Sam M. Fleming, President of Third National Bank. All of the facts and information contained in said letter are true and all opinions and beliefs contained therein are verily believed to be true. Copy of said letter is attached hereto and made a part hereof as Exhibit "A" to this affidavit.

3. In addition to the facts, circumstances and opinions set forth in affiant's attached exhibit letter of June 15, 1964, affiant has read the affidavit of W. S. Hackworth, executed August 13, 1964, wherein said W. S. Hackworth, as President of Nashville Bank and Trust Company, sets forth the underlying facts and circumstances supporting Mr. Hackworth's judgment that the merger already approved by

the Comptroller General should be carried through without delay. Based upon affiant's own investigation of the condition of Nashville Bank and Trust Company, as related in his attached letter exhibit, he is in agreement with Mr. Hackworth and refers to and adopts such facts in this his own affidavit and joins with Mr. Hackworth in his judgment that the merger should be approved and should not be judicially enjoined because it is affiant's own judgment that the merger is (i) a business necessity for Nashville Bank and Trust Company and (ii) in the public interest and in particular, in the interest of Nashville and the people who live in this area of the Central South.

4. Supplementing affiant's letter exhibit attached hereto of June 15, 1964, affiant states that as of August 4, 1964 he was promoted to the Senior Vice President-Finance of The National Life and Accident Insurance Company from his previous position of Financial Vice President, and has [fol. 38] also been elected a member of the Executive Committee of said insurance company, and by reason thereof has taken on substantially enlarged duties and responsibilities. This development serves to emphasize the fact stated in said letter exhibit that it would be impossible for affiant to leave The National Life and Accident Insurance Company or to devote any substantial time to the business affairs of the Nashville Bank and Trust Company.

Executed this 13 day of August, 1964.

William C. Weaver, Jr.

Sworn to and subscribed before me, on this the 13 day of August, 1964.

Dean Cliburn, Notary Public.

My Commission Expires: Jan. 26, 1966.

[fol. 39] EXHIBIT "A" TO AFFIDAVIT OF WILLIAM C. WEAVER, JR.

June 15, 1964.

Mr. Sam M. Fleming
President
Third National Bank
Nashville, Tennessee

Dear Sam:

In accordance with your request, I wish to give you the background of the negotiations and the intentions of our group which purchased the controlling interest in the Nashville Bank and Trust Company from the H. G. Hill Company and W. S. Hackworth.

Mr. W. S. Hackworth, President of Nashville Bank and Trust Company, indicated to me that the H. G. Hill Company would consider selling their controlling interest in Nashville Bank and Trust Company consisting of 9,845 shares of capital stock out of the 16,333 shares outstanding. As I recall it, this first definite indication from Mr. Hackworth came in October of 1963. Subsequently, I had a meeting with Mr. H. G. Hill, Jr., President of H. G. Hill Company and Chairman of the Board of Nashville Bank and Trust Company, and Mr. Hackworth the latter part of November, 1963. I advised these gentlemen that I was interested in considering the purchase of the controlling interest in the Nashville Bank and Trust Company purely as an investment. We had a general discussion about the matter and found that each one of us was interested in pursuing the matter further. We agreed to meet for further discussions at some future date.

Mr. Hill explained to me that he was interested in selling the Hill Company stock in the Nashville Bank and Trust Company so as to use the proceeds of the sale to expand the retail store properties of his company. He also said that he felt it necessary that his full time be devoted to the affairs of the H. G. Hill Company.

Because of out of town trips, the Christmas holidays, and other conflicts, I did not have another meeting with Mr. Hill and Mr. Hackworth until January 7, 1964 when we met in the Directors room at the Nashville Bank and

Trust Company. I did see Mr. Hill and Mr. Hackworth [fol. 40] on several social and business occasions and kept the negotiations active in this manner. At this January 7th meeting, I realized for the first time that Mr. Hill was really serious about selling the controlling interest in the Nashville Bank and Trust Company to me and my associates. He expressed confidence in me and my associates and stated that the Hill family felt assured that such a sale would leave the trustors, depositors, trust beneficiaries, employees and other stockholders of the Bank in strong and safe hands.

At the conclusion of our January 7th meeting, we agreed to meet again in a few days to discuss a definite price for the Nashville Bank and Trust Company stock and other terms and conditions of the proposed deal.

I had another meeting with Mr. Hill and Mr. Hackworth in the Directors room at the Bank the afternoon of Friday, January 10th. I asked Mr. Hill for an option on the H. G. Hill Company stock at $350 per share for a period of sixty to ninety days but he was unwilling to grant such an option. He indicated a willingness to sell the 9,845 shares held by the Hill Company at $350 per share and agreed orally to give me a reasonable period of time to purchase the stock on this basis. I thanked him for his offer and told him that my associates and I would endeavor to buy the Hill Company interest at $350 per share. Mr. Hackworth, at this same meeting, agreed to sell us 1,000 shares of his personal stock at $350 per share.

I worked over the following weekend and on Sunday afternoon, January 12th, I met with Mr. Hackworth and Mr. F. B. Young, Jr., Vice President and head of the Banking Department of Nashville Bank and Trust Company, at their office. We spent most of the afternoon going over the financial and operating statements of the Bank with my attorney, Mr. Walter M. Robinson, Jr. That night Mr. Robinson and I drew up a letter to Mr. Hill as President of the H. G. Hill Company and Mr. Hackworth, agreeing to purchase 9,845 shares from the Hill Company and 1,000 shares from Mr. Hackworth at $350 per share and also agreeing to make this same offer to all other stockholders of the Nashville Bank and Trust Company.

On Monday afternoon, January 13th, I met again with Messrs. Hill and Hackworth in the Directors room at the

Bank, and the agreement we had drawn the previous evening was executed by the three of us with only a few minor [fol. 41] changes. This letter was dated January 11, 1964 and the effective date of the acceptance by Mr. Hill and Mr. Hackworth was January 14, 1964.

You can easily see from the above timetable that this deal was consummated very quickly. Time did not permit either me or my associates to make a thorough study of future operating plans for the Bank. When we completed a survey of the situation, we immediately realized that there were a good many weaknesses and shortcomings which would make the expansion and development of the Bank most difficult. The most glaring weaknesses were:

(1) *Management*

Mr. H. G. Hill, Jr., Chairman of the Board, wished to retire to devote his full time to the H. G. Hill Company.

Mr. W. S. Hackworth, President, was 68 years old and expressed a desire to retire within the next two years.

The average age of the other officers was high and there were few capable young men coming along. The salaries of the officer group and of the employees were extremely low, so much so that capable young college graduates could not be attracted.

(2) *Branch Banks*

The Nashville Bank and Trust Company had only one small branch bank. When we investigated the possibility of establishing additional branches, we found that locations were very difficult to obtain and that the original cost plus the expense of maintaining the branch banks until they can become profitable was overwhelming. Also, the personnel of the Bank was totally inadequate to man a branch program.

(3) *Bookkeeping and Accounting*

We found that the Nashville Bank and Trust Company was not automated and had no computer. We also found that the cost of a computer was prohibitive for a bank this size.

[fol. 42] (4) *Pension Plan*

We found that the Nashville Bank and Trust Company was operating under a pension plan adopted on October 26, 1961 and that the benefits to retired employees were being paid out of current earnings. The cost to fund this plan on an actuarially sound basis would be very expensive and would be a rather substantial charge against future earnings.

(5) *Main Banking Office*

The physical quarters needed remodeling and renovating, the cost of which would be quite expensive.

When I first met with Mr. Hill and Mr. Hackworth the latter part of November, 1963, Mr. Hill asked me if I was available to devote my full time to the affairs of the Bank. I told him that it would be impossible for me to leave The National Life and Accident Insurance Company or to devote any considerable time to outside ventures. I explained that all the members of my immediate family, including myself, had a very substantial stock interest in The National Life and that I could not consider such a move under any combination of circumstances. I stated further that I would be unable to serve on the Nashville Bank and Trust Company Board of Directors and that this would also apply to all my National Life associates.

I think I should also point out to you that none of my associates in the purchase of the controlling interest in the Nashville Bank and Trust Company is a banker. If the Bank were to be operated by our group, it would therefore have been necessary to hire outside professional management. We soon found, in talking with various bankers throughout the country, that qualified management, capable of solving the problems of the Bank, would have better opportunities elsewhere. While we had no merger plans at the time we bought control of the Nashville Bank and Trust Company, it soon became apparent to us that a sound merger would be in the best interest of Nashville, the Bank and its customers.

After close analysis of all factors involved, it was our group's considered judgment that a merger with Third National Bank was feasible, and would best solve the many

problems facing the Nashville Bank and Trust Company. In fact, in the light of the inability of the investor group [fol. 43] to devote any substantial amount of time and thought to the Bank's operations, it would have been difficult in the extreme to resolve the Bank's management and operational problems without such a merger.

Sincerely, William C. Weaver, Jr.

WCW/cwm

[fols. 1a-44a] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

Civil Action No. 3849

UNITED STATES OF AMERICA,

v.

THIRD NATIONAL BANK IN NASHVILLE AND NASHVILLE BANK AND TRUST COMPANY.

Transcript of hearing—on Motion by Plaintiff for Preliminary Injunction, at Nashville, Tennessee, on August 14, 15, and 18, 1964.

Before: The Honorable WILLIAM E. MILLER, Judge of said Court.

* * * * * * *

[fol. 45a] Mr. Minicus: * * *

* * * * * * *

[fols. 46a-107a] The government is here to talk on the Sherman Act and the Clayton Act. We are not here for an interpretation of the Bank Merger Act of 1960. The Bank Merger Act of 1960 does state that competitive factors shall be taken into consideration, but it also states that a great many other factors with which we are not concerned today, which we speak of as banking considerations, also shall be considered.

They are not a part of this case. They have never been a part of any Clayton or Sherman Act case. We are quite sure that should this merger be consummated, there would be many benefits flowing to the acquiring bank. These would be banking considerations. Their deposits would increase. Their loans would increase. They would be doing a greater amount of daily business. Other things under the heading of banking considerations would accrue to it. It is even possible that, among the many evils that

would flow to the city as a result of this merger, some benefits would flow to the people of the city as well. This is a balancing of the equities, of course, but these are not our consideration today.

* * * * * * *

[fol. 108a] By Mr. Farris:

Q. Mr. Fleming, are you familiar with any other problems of the Nashville Bank and Trust Company?

[fol. 109a] A. Well, of course, the various problems have been mentioned in the application signed by Mr. Hackworth for the merger, in the Comptroller of the Currency's opinion. I can only concur in those which, briefly, are:

The age and health of the present chief executive officer.

The fact that Nashville Bank and Trust Company has only one branch—two offices in the community that is served by 50 banking offices. The downtown traffic today makes branching almost essential—almost essential if you are going to compete.

The low wage scale of their staff and only minimal fringe benefits. They just don't attract the brightest young personnel, and also it makes it very difficult to retain their better men.

The absence of depth in their senior management and the higher average age of the senior management is a problem.

The failure to take the first step in automation. Most banks in Nashville today—the three largest—have already automated. It is almost essential today, looking to the future.

The absence of a credit department, inadequate auditing department, practically no correspondent bank business, a bank office which is going to require a large expenditure [fol. 110a] to bring it up to date, and an inadequate and unfunded pension plan.

They are the problems that have been mentioned by Mr. Hackworth and by the Comptroller. And I repeat: I thoroughly concur in their conclusion.

Q. If steps were taken to overcome these problems, what effect would those steps have on the future earnings of the bank?

A. Well, first, if I may, on talking of earnings, I think the record ought to be corrected.

Mr. Minicus mentioned that the earnings of the Nashville Bank and Trust Company in 1963 were $713,000. If my information is correct, that was before income tax, and we figure earnings after income tax. If the Nashville Bank and Trust Company had spent the money that was necessary to keep modern, to pay competitive salaries, to do all of the things that I have just enumerated, they wouldn't have earned as much money as they have; and if they do that in the future, you can rest assured that their earnings are going to be adversely affected.

Q. Has the Nashville Bank and Trust Company lost any directors in the last few months?

A. They lost one of their principal directors and Chairman of the Board, a very key associate of his. In the last three weeks they lost by death another very important di-
[fol. 111a] rector. In fact, I would say that they have lost three of their most important directors in the last few months' time.

Q. Mr. Fleming, what, in your opinion, is the most logical and feasible way to solve these problems that you have described?

A. Well, I believe I would go along with the Federal Reserve Board in their decision in the Philadelphia case that I have just mentioned. It said that a merger into an institution which can supply the many things that are needed is the logical and most prudent way to solve these problems.

Q. Mr. Fleming, will you describe the publicity that has surrounded this bank merger?

A. Well, of course, there was publicity in January when the controlling stock was sold by the H. G. Hill Company to the Weaver group.

Then there was publicity—a great deal of it—at the time of the announcement of the proposed merger of the Nashville Bank and Trust Company with the Third National Bank.

There have been various newspaper articles in the intervening weeks and months as to what might happen.

And then when the comptroller's very strong opinion was issued in Washington, it was copied in detail by the local
[fols. 112a-115a] press. And, even before that, the Wall Street Journal took certain parts of that opinion from con-

text and created a little bit of an unfavorable situation there.

* * * * * * *

[fol. 116a] Q. My next question is: Would you please describe the effect a temporary injunction to halt this merger would have upon the two banks?

A. Well, I have just mentioned that considerable uncertainty and confusion exists today in the minds of the public at large, in the minds of the staff of the Nashville Bank and Trust Company and, to a small extent, of the staff of the Third National Bank. I am sure that the Nashville Bank and Trust Company is operating under great duress at the present time. They do not know what to expect. They don't know who they are going to be working for, they don't know under what conditions. That creates a climate in which other people come in and try to hire away the better people, and it creates a certain amount of inertia. You can't plan for the future. Nothing in the banking business is more deadly than uncertainty.

I was quite impressed with the paragraph 4, section (i), of page 5 of the Department of Justice's affidavit in support of the plaintiff's motion. It touches on this, and I [fol. 117a] would like to quote it. It says:

> ". . . A bank, unlike a commercial or industrial business, owes rather than owns its inventory, that is, its deposits. Thus customer confidence in the stability of a banking institution are particularly important ingredients in its business. Such confidence is necessarily impaired or destroyed during the uncertainties."

By the Court:

Q. Where did you read from?

A. That is paragraph 4, section (i), page 5 of the Department of Justice's affidavit in support of the plantiff's motion.

The Court: All right.

By Mr. Farris:

Q. Now, Mr. Fleming, if the banks were permitted to merge, and then at some later date a final order of divestiture should be ordered by a court, what problems would that present?

A. Of course, it would present a problem, but the problem is not as pronounced in an institution that has a branch banking system.

I was a little bit surprised when Mr. Degnan (I believe) stated that there had been no precedent. My recollection is that there was a very definite precedent in the Department of Justice itself when the United California Bank [fol. 118a] turned over a group of their branches to form the First Western Bank in California. That was divestiture, and I think ordered by the Department of Justice. That was a logical (I think) solution of a problem that existed in California. There are other cases pending, and——

I don't know anyone particularly knowledgeable in this field that doesn't think that the federal jurisdication—the federal courts won't be able to find a solution.

As I say, the problem would be more difficult if you didn't have branch banks; but when you have branch banks, there are various avenues of solution that present themselves.

By the Court:

Q. If there is a merger, that would mean that all of the customers of the Trust Company—their accounts, of course, would be transferred into the merged bank, would it not?

A. Yes, sir.

Q. Now, suppose that at the end of the road in this litigation, the Court should hold that the Clayton Act was violated and order that there be a divestiture and the status quo restored, what would you do with those accounts? Suppose the customers did not want to go back [fol. 119a] to the Nashville Trust Company, how would you get them back there?

A. Of course, your Honor, you couldn't tell a customer where to go; but I want to mention again what was done in California. This bank had a lot of branches around California, and the Justice Department, on the recom-

mendation (I guess it was) of the Justice Department—I might not be clear on the procedure here—but the federal judge with the consent of all parties ordered a divestiture in which a new bank was created with some 65 or 70 of the branches of the merged institution. And the totals that came out of that divestiture approximated the size of the bank that was merged into the larger.

Q. It would be a very expensive thing, though, would it not, to divest and reestablish?

A. I don't know that I am competent to comment accurately on that. Of course, if you—if a pattern were followed—I am not recommending a pattern like this—but if a pattern were followed, and (say) you have got 40 million dollars worth of deposits, and you have got four branches that have 40 million dollars worth of deposits, and you create a new bank with those. That would not be expensive at all.

The Court: All right, sir. Go ahead.

By Mr. Farris:

[fol. 120a] Q. I was going to ask you this, Mr. Fleming: Which would be more harmful to the bank, a temporary injunction to halt the merger or an order of divestiture at a later date?

A. As I mentioned, divestiture presents some problem, but you mention a temporary injunction. That worries me a good deal, that word "temporary." There is a question when you get a situation of uncertainty and confusion as exists today in the minds of the staff of the Nashville Bank and Trust Company and customers and the public to a certain extent. It either goes—It either progresses rapidly downward or else it straightens itself out, but history has shown that it doesn't get any better until some prudent, logical solution has come about.

So I would say that if this situation continues for a matter of even a few weeks, but if it should for a few months or a year because of court procedures, it could create a—a real problem—a problem that would transcend greatly in importance any problem that divestiture might offer.

Q. Mr. Fleming, would it be possible, if an injunction were granted, to maintain the status quo during the period while the injunction remained?

A. As I interpret "status quo," you mean staying where you are. Well, I—I never have believed that you can stay [fol. 121a] stationary. You either go backward or you go forward.

I was impressed in reading what Justice Oliver Wendell Holmes once said. He said: "It is not so important where you are, but in what direction are you going." And certainly that is the case in the banking business.

I don't think that the status quo exists today. I think it was changed back at the date that the proposed merger was announced. I think it has degenerated rapidly since, and particularly within the last two weeks.

Q. Mr. Fleming, is there anything further regarding this merger that you care to add?

A. Well, I have covered it pretty thoroughly in the answers to your questions; however, I would say this: The directors of these two banks, composed of some of the outstanding citizens of Nashville, approved this merger four months ago. The stockholders, composed of nearly two thousand citizens of this locality, ratified it without a single dissent.

The public apparently has no objection because none has previously been offered, and no evidence to that effect has been presented here today.

The Comptroller of the Currency in an unusually strong opinion has approved the merger.

[fols. 122a-137a] The Superintendent of Banks of Tennessee has stated in a letter that is part of the application that he does not feel there will be a lessening of competition because of the merger.

The pattern of banking as it exists in Nashville today and the pattern of banking as it exists among the cities of this central southern area will not be changed by reason of the merger.

Many problems that admittedly confront the Nashville Bank and Trust Company will be resolved almost overnight if the merger is allowed to go forward.

It is, therefore, my considered judgment that it is in the public interest, that it will answer the very great problems that are involved in this case, and that the merger should be allowed to go forward without further delay.

* * * * * * *

[fol. 138a] Cross-examination.

By Mr. Minicus:

Q. What steps would have to be taken to restore those trust accounts to their status before the merger?

A. I don't believe you could restore them to the exact status because the merging bank had lost its identity and, [fols. 139a-141] therefore, you could not go back to the original status. But, in case of divestiture, I should say the trust accounts would present the least problem, and I want to get the record straight. You quoted me a moment ago as saying that it did not present a problem. I did say that divestiture would present a problem, but not an insurmountable problem. Now, I should think that the trust matters would present the least problem of all because they retain their identity in a bank. It is not much problem to trace down a trust account. If you have got a trust, it stays as a trust. A certain beneficiary—the identity of it doesn't change.

Now, if the judge wanted to order divestiture by the creation of a new bank (say) out of a certain number of branches that had approximately the same deposit totals of the merging bank, and that merging bank had certain trusts as such, you could certainly follow through and ask that those same trust accounts be moved into the new bank.

It wouldn't be any problem to identify those trust accounts. That's the easiest of all. It is a little bit difficult to trace a checking account because it fluctuates every day, but the trust account doesn't change its identity.

* * * * * * * *

[fol. 142a] By the Court:

Q. Let me ask you: Suppose there is a merger, the bank would be in the present location of the Third, would it not—all of the facilites?

A. Oh, no. It is the plan—and we have so announced——

Q. You would keep the old plant?

A. Indeed, we would. And not only is it our intention to keep the old plant but to keep the same officer staff in the same places they are now, handling the same customers they are handling now.

Q. So there would be no problem of locating a new bank or buying a new building or anything of that sort?

A. None whatsoever. We have written a letter over the [fols. 143a-167a] joint signature of Mr. Hackworth and myself to all the customers that it is our intention that they be served by the same personnel at the same location as they always have been.

* * * * * * *

[fol. 168a] Mr. Farris: Let us go back to the Depression days, (this is all in the application) when the Nashville Bank and Trust Company was not in the best of condition, nor were any banks. It was about the time of the bank holiday, and the indication is that that bank was acquired by Mr. H. G. Hill, Sr., who was a very public-spirited citizen. No doubt he thought he could help the community, being known as a wealthy man, by taking over that bank and giving it some prestige. He acquired it. However, throughout his life and in the life of his son, Mr. H. G. Hill, Jr., who continues to operate the H. G. Hill Grocery Company, the interest of the Hills was primarily in the grocery business. Their entire efforts were devoted to the grocery business, and the bank was just there.

They helped the bank to a certain extent because people who wanted to do business with the Hill Grocery Company would incur a little favor by opening an account in the bank; but, now, that help and that influence are gone. Mr. Horace Hill, Jr. has sold the Hill Grocery Company's interest in the Nashville Bank and Trust Company, and he has resigned from the Board of Directors. And one of his right-hand men, Mr. Thweatt, who was also a director of [fol. 169a] the Nashville Bank and Trust Company, has resigned.

Shortly after that sale occurred, the leading new-business man—business-development man—for the Nashville Bank and Trust Company moved over to First American National Bank, and he boasted that he would get every account away from there that he could. And he worked at it pretty hard, and he has done reasonably well with it. He was the man that had been calling on these customers heretofore. Now, he was in a position, your Honor, to go to these customers and say:

"You ought to come on over and do business at First American. What do you know about the future of the Nashville Bank and Trust Company? How can you be assured that this line of credit you have is going to continue? You come on over with me, and we will promise you that your line of credit will be continued. Mr. Hackworth is getting along in years. He is getting ready to retire. This merger is in the future. You had better remove that uncertainty and come on over here with me at First American."

That has been going on for four months—five months. The Nashville Bank and Trust Company has some very able men—two or three—and they have been calling on [fols. 170a-171a] these customers and saying:

"Just hold everything. This merger is going through, and your problems are going to be solved."

But the customers have been holding on, waiting to hear, waiting to know about the merger. An injunction at this time would make it very difficult to continue to hold a lot of those customers. It would make it very difficult to hold a lot of those employees.

We understand that Mr. Weaver—and this is in the record—and his group first intended to try to operate this bank. He has so stated, but he looked into the problems (all of these problems have been outlined and testified to, and I don't think your Honor needs to hear a list of those again), and he found that to solve these problems would require a lot more than just remote-control operation. Mr. Weaver was not in a position when he bought into the stock —nor is he now—to go in there and operate this bank himself. So it looks as if the solution of merger is the only solution appearing before us except a situation where a fine institution in Nashville might just gradually wither on the vine.

* * * * * * *

[fol. 172a] Now, if your Honor please, with this picture where you have these two or three good key men with the Nashville Bank and Trust Company and this doubtful and uncertain situation, suppose these two or three key men who are left should be enticed away during a period of

two or three years while litigation continues, suppose these two or three key men were to become employed by the First American or the Commerce Union. You see, the Third National Bank could not afford to go over and hire those men away from the Nashville Bank and Trust Company right at this time. It is just something that they [fols. 173a-174a] could not do. But the First American could entice them away. Commerce Union could entice them away. And if, at the end of a two- or three-year period of litigation, these banks should finally prevail, they would have a hollow shell, a mere shadow of the bank that exists there today.

I think these two or three fine men who stayed have demonstrated a terrific amount of loyalty to that bank, but they can't be expected to live month in and month out and week in and week out in a period of uncertainty over several years. And that goes all up and down the line.

* * * * * * *

[fol. 175a] If your Honor please, it would be in the public interest for the customers of the Nashville Bank and Trust Company to be reassured by allowing this merger to go ahead so that the bank officers can say to these customers:

"Your line of credit is going ahead. You can plan to operate your business next year because this matter has been settled. The merger has gone through, and you need not worry about your line of credit."

It would be in the public interest, if your Honor please, [fol. 176a] for this larger resulting bank to have larger legal limits so that it can accommodate some of the larger customers here who now have to go east and north to meet their borrowing requirements.

It would be in the public interest, if your Honor please, for the employees and the officers of the Nashville Bank and Trust Company to have larger salaries and increased fringe benefits and a funded pension plan.

It would be in the public interest, if your Honor please, for all of the people of Nashville to have the benefit of full service banking provided by the Third National Bank through all of its branches and to bring those benefits to the customers of the Nashville Bank and Trust Company

who now do not have the benefit of a branch banking system. People who want to do business with the Nashville Bank and Trust Company at the present time may say to an officer:

"I don't want to fight that downtown traffic and come all the way down to Union Street to do my banking business. I am going to stick with one of these branch banks out here in Belle Meade," or "Green Hills," or "East Nashville," or "West Nashville," or "Woodbine"—wherever they are doing business. "I am going to the neighborhood bank."

The Third National Bank's branches are in those areas, [fol. 177a] and will then be available to those customers. It will be in the public interest for them to have that.

If your Honor please, I now want to talk about this problem of divestiture. Mr. Hooker showed that there are many situations in which bank mergers are being attacked by the plaintiff and in which the plaintiff is just asking for divestiture. There are situations where these temporary injunctions have been denied, and divestiture remains as a matter of relief sought by the plaintiff.

Of course, problems surround a solution to a case of this kind if the bank should finally lose the case, and the Court should determine that divestiture should be ordered. No one has denied that problems exist, but those are the problems of tomorrow, those are the problems which might never occur, and those problems—as difficult as they might be—are less damaging and less harmful than would be a temporary injunction at this time.

To get down into the practical side of this problem, the witness, Mr. Fleming, testified that it would be very easy to pick up two or three branches that had 40 million dollars of deposit totals and to separate those off.

If the Third National Bank, your Honor, should be called upon two years from now or three years from now to give back to this city a $45,000,000 bank, it could be done. Mr. [fol. 178a] Fleming has testified that it could be done. Sure, there would be hardships. Sure, it would present problems, but lesser problems than the problems that we face today.

Now, insofar as trust accounts are concerned (your Honor asked about that), the witness, not having full

knowledge of the jurisdiction of the courts, did not exactly know how to answer that question; but I will attempt to answer it for your Honor. The Chancery Courts (as we all know) have jurisdiction over the appointment of substitute trustees. If a plan of divestiture were presented, this Court could order the bank officials to petition the Chancery Court to appoint substitute trustees; and I can't conceive of any chancellor in any of our courts not being cooperative with this Court and attempting to do what this Court wished done in case divestiture were ordered in a case of this kind.

If the Court please, the status quo here has already been lost. It is an elementary proposition that one of the purposes of a temporary injunction is to preserve the status quo. Where this publicity has been as much as it has, where this matter of confidence is as important as it is to banking, where the mind of the public, questioning, wondering about the future, enters into this picture, the status quo has already been lost. It is slipping away day by [fols. 179a-202a] day.

* * * * * * *

[fol. 203a] Mr. Hunt: Now, I turn to my final point, and that is the problem: Is divestiture an adequate remedy in the event this Court refused a temporary injunction and in the event, on final hearing, it should be determined that the government was entitled to relief?

I will just read three sentences from the most recent case on that which is United States v. Crocker-Anglo National Bank, 223 F.Supp. 849. That is a case where, incidentally, it was a District Court consisting of three judges —not the ordinary statutory judge court. It consisted of [fol. 204a] three judges because of the right of the government to ask for three judges in that type hearing, a right, by the way, which the statute does not give the defendants, but which has been held constitutional many, many years ago by the Supreme Court. Denying the interlocutory injunction, the Court said:

"So far as the presently proposed merger is concerned, should the Government make a case on final hearing, we would be confronted with a problem of divestiture. We

appreciate the difficulties presented in such a case. But those alone do not warrant a preliminary injunction."

Now, here, as the record stands and as the fact emerges, divestiture would present a relatively simple and non-difficult problem. All of these problems of whether your Honor grants a temporary injunction or leaves the problem of divestiture, I don't try to say that any one of them is totally simple. That is not my position, but it would be relatively simple, and the way has been pointed by Mr. Fleming's testimony.

Let me take an illustration as to commercial banking. The Nashville Bank and Trust Company presently has its main office and one branch. Third National has fifteen. The disparity between the two is about a ratio of seven to one.

The Court: Is this branch to be retained if the merger [fol. 205a] goes through?

Mr. Hunt: It will be retained.

The Court: The one branch?

Mr. Hunt: The one branch. Well, you mean by that that it will be retained in operation?

The Court: Yes.

Mr. Hunt: Yes, it will be; and there is a commitment to that effect over the signature of Mr. Hackworth and Mr. Fleming. No branch will be abolished. No branch will be closed. The single bank—Third National, the emerging bank—will continue in existence operating every branch now operated by itself and the one branch operated by the Nashville Bank and Trust Company and operating what is now the main office of the Nashville Bank and Trust Company as a branch. There will be no abolishing of any branching location whatsoever. The same offices at the locations will continue, and this is part of that statement that was made by both banks' presidents, and will continue to serve the same people and in a bank, I venture to say, with the predominant elements of the officers with whom you deal and your location. In other words, the officers will stay with the location, and presumably the business will stay there, too. But we can assume it moves.

Now, looking at the commercial banking idea, as I understood Mr. Fleming's illustration, it would be of this type:

[fol. 206a] Suppose this Court ordered divestiture somewhere down the line. Let's assume that at the moment of the merger, Nashville Bank and Trust Company had 40 million dollars in deposits. Let's assume, at the moment of the ordered divestiture, the Nashville Bank and Trust Company's two locations had 30 million dollars in deposits. This Court, I feel sure, would look back to the original status and would order that there be a 10 million transfer. How would it come about?

The Court could simply detach two branches from Third National Bank that at that moment had five million dollars in deposits fees, and order that there be set up a new bank with these 40 million dollars in deposits.

That would be the answer. I mean the practical answer. And you would get at the problem of the loans and all that. In a large sense, they will follow the deposits—I mean the loans will—but let's assume they did not. The Court handles that.

Let's turn and look at the trust accounts. The Banking Act provides for automatic succession of trustee. I mean the bank emerging becomes trustee. A state court still has the right to appoint a substitute trustee. The only limitation there is that you must not discriminate against this bank because it is a national bank.

In most cases, the bank has been named trustee in a will [fol. 207a] or in a living trust. There is a succession there. It may be that it is provided for in the will or in the living trust that the creator of the trust reserves the right to transfer it somewhere else. Nobody can help it if he exercises his right to go elsewhere—to one of the other banks in Nashville.

But let's assume now that trust insofar as Nashville Bank and Trust Company is concerned will be adiministered at its same location, you see.

There, you have got a disadvantage to the Third National because they have announced and the President has testified that he plans, by reason of space, to move the whole trust department over to the present location of the Nashville Bank and Trust Company. How you would return the moved part to him presents more of a problem. All the accounts automatically, you could follow. The account doesn't change.

John Doe has created a trust for his daughter, and it is

presently being administered by the Nashville Bank and Trust Company. Sam Smith has something else that is presently being administered by the Third. All that record is available, you see, for making the transfer; but if anybody got the advantage of that divestiture—and it is still not a complicated matter—it would be the smaller bank to which the assets were returned because the transfer of [fol. 208a] location in this case—and it is the only transfer that would take place—would be in their favor.

So I do not think it can be said, and certainly it cannot be said on this record, and that is what I keep saying. I as a lawyer—Government's able counsel and lawyers can't express an expert opinion to you: "Now, here, transfer will be difficult," and this, that, and the other. If they believe that, they should have come in here with evidence at this hearing to sustain it. We have in here evidence that divestiture would not be an exceedingly difficult problem.

On the total basis, then, of all I have said——

The Court: What about the charter problem?

Mr. Hunt: On the charter problem, I think this, that your Honor could direct—In the first place, there has got to be some decision by the persons—the stockholders or someone. I mean their wishes could be consolidated. Your Honor could direct that application be made to the Comptroller of the Currency or, if desired, to the Superintendent of State Banks for a charter. I cannot reasonably foresee that application made under those circumstances would be rejected. The bank would have adequate capitalization. The bank would have adequate deposits, and so forth and so on. Again, I don't think we can assume that the Comptroller of the Currency would refuse that type [fols. 209a-220a] application. It would not be made by the Court, but it would be made under Court order just as the Court may order that So-and-So apply to Chancery Court for a determinative decision of a state statute. You can't make the Chancery Court entertain the suit. It is fanciful, I think, to imagine that one would refuse; and I think that here it is fanciful to imagine that the application so made would not be granted.

And so (as I said) I do not think it is an insuperable problem, and I think the government is really foreclosed from arguing that it is an insuperable problem because of the several cases they are presently pursuing asking divesti-

ture. They are not in a position to say, "Oh, it is an impossibility, although we are asking for it in such and such case to give us an impossibility."

All the reasons, then—the lack of reasonable probability of government success, urgent and compelling reasons that exist both as to the preliminary hearing, and finally the additional urgent necessity that there be no temporary injunction under the present conditions—prompt us to say that this application should be denied.

* * * * * * *

[fol. 221a] COLLOQUY BETWEEN THE COURT AND MR. MINICUS

The Court: Mr. Fleming has stated that the effect of a prolonged delay in this matter, if an injunction should be granted, would be most detrimental not only to the Nashville Bank and Trust Company but to the Third National Bank, that it would have a serious impact. What is your——

[fol. 222a] Mr. Minicus: In the event of keeping the banks apart?

The Court: Yes.

Mr. Minicus: I believe that with the certainty of the operation with a considerable period, that with the Nashville Bank and Trust there would be some pulling of itself together and picking up of operations with the very good possibility that the bank will continue as an independent bank. I believe that the efforts would be expended that have not been expended. Of course, on my part and on opposing counsel's part all this is suppositious. Nobody can say what is going to happen.

The Court: That is true, of course.

Mr. Minicus: But I believe that it might provide a stimulus to ownership who has a great deal of money involved here to get busy and give that bank the management that it has been accustomed to in the past.

The Court: It would place them, though, in a very uncertain posture, would it not, as to making any improvements in their services and facilities?

Mr. Minicus: The uncertainty would be just as great were the preliminary injunction not granted with the threat

hanging over of ultimate divestiture anyway. It might be more ruinous to the morale because then, whereas they have a going organization now, after a decree ordering divesti- [fol. 223a] ture, they have to start right from the ground, which would be the charter, and work up from that with everything done.

The Court: Of course, the divestiture, aside from the technical problems, would itself have some serious consequences perhaps with respect to the banks involved. The people interested in this merger have themselves a serious decision to make on this question, and they see fit to take this risk, to go ahead and merge, if the Court does not grant a preliminary injunction, at the risk of a later divestiture, knowing what those risks are and what the consequences are.

Mr. Minicus: This is a problem, your Honor, that they have brought upon themselves.

The Court: Yes.

Mr. Minicus: We are interested primarily in the public interest. We feel (as the courts have said) that any inconvenience felt by the parties to the merger who are being held up cannot even be weighed on the same scale with the danger to the public interest. There must, of course, be a balancing of equities here.

The Court: That is true. In all of these injunction cases, there has to be a balancing of the various competing interests.

Mr. Minicus: It is the private convenience against the [fols. 224a-238a] public interest that is opposed in this case, assuming (as we must) that there is a tremendous public interest which Congress has restated.

The Court: Of course, the public interest is not only concerned with the Clayton Antitrust Act, but there is a public interest in having a stable banking structure in the country, is there not?

* * * * * * *

[fol. 44] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION.

Civil Action No. 3849

UNITED STATES OF AMERICA, Plaintiff,

v.

THIRD NATIONAL BANK IN NASHVILLE AND NASHVILLE BANK AND TRUST COMPANY, Defendants.

MEMORANDUM OPINION—August 18, 1964

This action was instituted by the plaintiff, United States of America, against the Third National Bank in Nashville and Nashville Bank and Trust Company to enjoin their merger pursuant to an agreement entered into on March 12, 1964. The complaint charges violations of Section 1 of the Sherman Act and Section 7 of the Clayton Act. On August 10, 1964 a motion was filed by the plaintiff for a preliminary injunction pursuant to Section 15 of the Clayton Act and Section 4 of the Sherman Act. By agreement the proposed merger was not consummated by the defendants pending a hearing on the motion for preliminary injunction which was set for August 14, 1964, and pending the ruling of the Court upon the plaintiff's motion.

A full hearing was held on August 14 and 15, 1964, and the attorneys for the respective parties were allowed to make extensive and elaborate arguments in support of their contentions. Evidentiary material relied upon by the parties has been presented in the form of affidavits, verified [fol. 45] pleadings, exhibits, and the testimony in open court of the President of the Third National Bank.

It is well settled that in order to obtain a preliminary injunction the Government is required to establish a reasonable probability that it will ultimately prevail on the merits and that a denial of the injunction will result in a substantial injury to the general public for which there is no adequate means of redress. In this case the first question to be determined is the effect of the proposed merger upon

competition in the field of commercial banking in the Nashville Metropolitan area.

While the evidence is in some conflict as it has been presented to the Court on the question of the effect of the proposed merger on competition, the Court is persuaded that the Government has failed to carry the burden resting upon it to obtain the extraordinary relief of a preliminary injunction. It is true that the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Department of Justice, each reported to the Comptroller of the Currency an opinion adverse to the merger on the ground that it would have an adverse effect on competition. However, it is to be observed that these reports were based primarily upon cold statistics without consideration of other factors having, in the Court's opinion, a direct bearing upon Nashville Trust's posture as a competitive factor in commercial banking in this area. The Comptroller of [fol. 46] the Currency, who is assigned by law the duty of approving or disapproving bank mergers, and who is required to consider among other factors the effect the proposed merger will have upon competition, rendered a detailed and comprehensive opinion or memorandum in which he carefully explained the reasons for his ultimate conclusions that the merger will promote the public interest and will not substantially or significantly lessen competition. Pertinent portions of his statement are as follows:

> "The merging bank, chartered in 1889 as a trust company, passed through a merger and reorganization and emerged in 1956 with its present title. In 1959 the bank opened its first and only branch. Prior to January 1964, it was controlled by a wholesale grocery firm, which sold its stock in the merging bank to a syndicate controlled by insurance interests. The new owners soon found that injection of a substantial amount of capital and effort would be required both to make the bank a competitor in the Nashville area and a profitable undertaking for the owners. Having no desire to divert their attention from the insurance field and being unwilling to put large sums into the bank, these interests gave consideration to the merger route for a solution. They were prompted in part by

the fact that, during the period since assuming control, deposits in the merging bank declined from $45.4 million to $39.6 million, despite an increase of $1.1 million in public fund deposits. By contrast, deposits in the other three banks in the city rose sharply after 1960 and continued to rise. Many of the merging bank's customers, who previously felt obligated to maintain deposits in the bank because of their business connections with the previous owners, the wholesale grocery firm, indicated that they were then free to move their accounts to larger banks. Additionally, the change of ownership resulted in a substantial loss of accounts in the bank's trust department.

[fol. 47] "One of the most determinative factors in the consideration of this merger is the problem of management succession. This Office has stated time and again that a bank is only as good as its management. In the case of the merging bank, the president is ill and anxious to retire. Further, there is no provision for succession. The dearth of young management personnel and the unlikelihood of attracting new employees to the merging bank is due to the below average salary scale and the lack of an adequate pension plan. The present owners of the bank show no intention of instituting costly reforms to attract employees capable of making the bank a vigorous competitor, responsive to the needs of the community. As a result, the merging bank is presently non-competitive. Only through merger with the charter bank, where the resulting bank will be a National Bank, will this Office have an opportunity to assist this non-competitive state-chartered institution as well as the people of the Nashville community. We would, indeed, be derelict in our responsibilities to protect the public interest in banking were we to impede effective management from assuming the responsibilities of a declining and leaderless merging bank.

"We turn now to the future earnings prospects of the applicant banks, another criterion established by law in the consideration of bank mergers. The future earnings prospects of the merging bank, in its present condition, are very gloomy. The recent substantial decline in deposits and the phlegmatic and incapaci-

tated management bode ill for future earnings of the bank unless remedial steps are taken. If merger is the remedy, however, as we are convinced it is, the future earnings prospects of the resulting bank are excellent because of the dynamic management, existing branching system and operating efficiency of the charter bank.

"Only minimal competition exists between the two applicant banks due to difference in size and to diversity of market interests. As stated above, the charter bank serves numerous correspondent banks throughout its region. These correspondent banks' deposits account for 18.7% of the charter bank's deposits, as compared to the merging bank's correspondent deposits which amount to only 1.2% of the merging bank's de- [fol. 48] posits. Commercial loans make up 40% of the charter bank's total loans, but only 25.7% of the merging bank's total loans. Further contrast can be seen in the fact that, while real estate loans account for only 0.8 of the charter bank's loans, such loans constitute 34% of the merging bank's loans.

"While the cold statistics presented by the application may indicate at first blush that some competition now exists between the applicants and that it will be eliminated by this merger, closer analysis of the complete picture dispels this hasty conclusion. A bank's competitive force in its community depends greatly upon the attitude of its management and board of directors. To assess accurately competition between two banks, an effort must be made to weigh the aggressiveness, the capability, the experience and the desire of the management of each to compete. When, as in this case, we find that the management of the merging bank is more interested in insurance than in banking, has no desire to maintain the bank's relative standing in the banking community, and has made no effort to improve its internal operating procedures nor elevate the morale of its personnel through better salaries and an improved pension plan, we cannot realistically view it as a competitive bank. When a bank, such as the merging bank, is not disposed to compete, it is idle to speak of the elimination of competition by reason of a merger.

"The hallmark of modern banking is branch competition. The inability of the merging bank to effectively serve the public is graphically illustrated in its failure to develop a modern branching system despite the fact that it was founded in 1889. With the three largest banks in Nashville having 20, 15, and 20 offices, respectively, it is manifest that Nashville Bank and Trust Company, with a single branch, cannot compete in the important area of branching.

"The competition for funds in the Nashville community is not confined to commercial banks. It must be noted that savings and loan associations are particularly strong competitors. While competition is most desirable and indeed a basic tenet of the American economic system, the advantages to savings and loan associations arising from higher permissible interest and dividend rates, as well as tax privileges [fol. 49] not available to commercial banks, make a difficult competitive situation for the banks. This fact is reflected in the 325% increase in savings and loan share accounts in the Nashville community since 1953 and the opening of three new savings and loan association branches during the past year. There is certainly a need for a stronger institution to compete for funds in such a market.

"There is no tendency toward monopoly in the Nashville area or community. The charter bank has never been involved in a merger since its founding in 1927; its rapid growth has been internal. The number of Nashville banks has not declined during the past 30 years. Indeed, a relatively new bank, the Capital City Bank, which was chartered in 1960, now has almost $7.5 million in resources and two branches. There is hardly a monopoly when a new bank can enter the market and prosper so remarkably in such a short time.

"One of the best qualified authorities on banking in Tennessee has recognized the fact that the merger will be a salutary development. In a letter of April 25, 1964, Mr. M. A. Bryan, Superintendent of Banks, State of Tennessee, said of the proposed merger:

"The competitive factor in my opinion will not be lessened by the merger. This assumption is based

on the evident competition which now and will exist between existing First American National Bank, largest Nashville bank, The Commerce Union Bank, in third position, and Third National Bank, second in size, the surviving institution of the merger between themselves and Nashville Bank and Trust Company which holds a minor position in the field insofar as competition is concerned.

"Consummation of the proposed merger will improve the charter bank's ability to serve the convenience and needs of the Nashville public. It will be better able to meet the credit needs of its larger customers throughout the Nashville wholesale trade area. Automation will improve the operating efficiency for the benefit of the merging bank's customers. Increased [fol. 50] salaries and other incentives such as the charter bank's pension plan will improve the morale of the merging bank's personnel. The more numerous banking services offered through the resulting bank's extensive branch system will better serve the needs of the merging bank's customers. Further, the assets of the merging bank will be pooled with those of the charter bank to be used more efficiently in promoting the economic well-being of the people of the Nashville community, the wholesale trade area which it serves, and the mid-South region of which it is the center."

The testimony of the President of the Third National Bank at the hearing gives strong support to the Comptroller's findings, and although his testimony is admittedly interested testimony, it is entitled to considerable weight because of the bases for his conclusions. He commented particularly upon the fact that the Nashville Bank and Trust Company did not have and has not had for a considerable length of time managerial capability in depth; that its salary scale has been below the average for the area and was insufficient to attract qualified personnel; that it did not have an adequate pension plan for its employees; that it lacked automation, an almost essential feature for a modern, progressive bank; that its President, who had been primarily responsible for its measure of success in recent years, was almost out of the picture because of ill health; and that no provision had been made

for his successor. It was his opinion that new personnel for a bank should be recruited primarily from the community in order to obtain persons having local contacts [fol. 51] and knowledge of local conditions. He felt that the Nashville Bank and Trust Company was not in position to do this in competition with other banks paying better salaries and offering better benefits to its employees. Another factor of importance which he commented upon in his testimony was the fact that the Trust Company had only one branch bank with the result that it was not in position to offer its services except in a very restricted area in downtown Nashville. To place it in position to be truly competitive it was his opinion that a large expenditure of money would be required to provide for automation, improved facilities, larger salaries, branches, etc.

The affidavit of Mr. Hackworth, President of the Nashville Bank and Trust Company, is equally factual and convincing that the Trust Company, although it admittedly has substantial assets, deposits and loans, is not, vis-a-vis the Third National, a major or even a substantial competitive factor. It is pointed out that the bank has lost the benefit of the active influence and interest of one of its principal owners and board members over a period of many years who has doubtless attracted a large share of its business.

There is no basis for concluding on the present record that these adverse conditions have been contributed to or brought about by the Weaver group which bought the controlling interest in the Nashville Bank and Trust Com-[fol. 52] pany in January 1964. It can be inferred, of course, that the Weaver group did not see fit to spend the large sums of money which would have been required to improve the competitive position of the bank and that as an alternative they entered into the agreement above referred to to merge with the Third National. But this is a far cry from saying that the conditions were caused by them. In essential part they antedated the change of ownership.

The decision of the Supreme Court in *United States* v. *Philadelphia National Bank, et al.*, 374 U.S. 321, decided that the Clayton Act is applicable to bank mergers. The decision of the Supreme Court in *United States* v. *First National Bank and Trust Company of Lexington, et al.*,

12 L.Ed. 2d 1; reaffirms the applicability of the Sherman Anti-Trust Act to bank mergers. These are the principal authorities relied upon by the government to support its application for a preliminary injunction in the present case.

However, the Court does not find that these cases are controlling here. In the Philadelphia case, the second and fourth largest banks merged, forming a bank which became the largest in the market area, whereas in this case the new banking institution will not occupy first place, although admittedly it will be in a stronger competitive position. In Philadelphia neither bank had anti-trust clean hands—the Philadelphia National having acquired nine [fol. 53] formerly independent banks and the Girard six; an acquisition extending over a long period of time into the recent past. In the present case, there is no such history. In Philadelphia, the two banks were of comparable size, were admittedly major competitors in the market, and neither bank had any major problems of management or personnel; whereas in the instant case, the Trust Company's share of the market as compared with the other three leading banking institutions is not on a comparable basis. It is met with a deteriorating managerial and personnel situation. Another significant factor is that in the Philadelphia case the merger caused a market share increase of approximately 33% on the part of the two largest banks; whereas in the present case, the increase is only approximately six percent.

In *United States* v. *First National Bank and Trust Company of Lexington*, the Supreme Court held that the proposed consolidation was unlawful under Section 1 of the Sherman Act based upon a variety of factors not controlling here, including the presence of a purpose to monopolize rather than to satisfy business requirements, the probable development of industry, consumer demands, etc. One differentiating factor between the Lexington Bank and the instant case is that the bank in Lexington, after the merger had been consummated, was three times as large as its nearest competitor and larger than all other banks in the community combined. Finding that neither the Philadel- [fol. 54] phia nor Lexington cases is in point or controlling, the Court is of the opinion that it cannot be said on the basis of the present record that there is a reasonable prob-

ability that the Government will prevail in this litigation. It may do so after the facts are more fully developed. Or it may be that after a trial this Court will have a different opinion, or that if it does not have a different opinion, the Appellate Courts may take a different view. If Government success in the litigation should be the eventual outcome, it would be necessary to order a divestiture. This device, much discussed at the hearing, is concededly fraught with many problems and difficulties. Nevertheless, it is not uncommon as a remedial procedure in anti-trust litigation, and the Court is not prepared to say that a divestiture, if it should become necessary in this case, could not be successfully effected. The defendants are aware of the risks involved. They know that the final result in this case cannot be predicted with absolute certainty. They have indicated their willingness to assume the risks, aware that they may in the end have to undo what they have done. Such a willingness strengthens the belief that a substantial restoration of the status quo could be fairly brought about by divestiture if the merger should finally receive judicial condemnation.

The Court has been presented with no facts to indicate any bad faith on the part of the parties concerned with the merger and no facts from which to conclude that they [fol. 55] have entered into an unlawful combination or agreement. On the contrary, the natural and reasonable inference is that a merger presented itself as a logical alternative to the expenditure of large sums of money to improve the facilities and services of the Trust Company and to place it in a position to compete successfully on a market which the evidence shows to be one of the most fiercely competitive in the United States.

The motion for preliminary injunction is therefore denied. Order accordingly.

Wm. E. Miller, United States District Judge.

[fol. 56] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION.

Civil Action No. 3849

[Title omitted]

ANSWER OF COMPTROLLER OF THE CURRENCY, JAMES J. SAXON —Filed March 10, 1966

1. He admits that this action is filed under Section 1 of the Sherman Act and under Section 7 of the Clayton Act; he denies that any violation of these acts has occurred or is continuing.

2. He admits the allegations of paragraph 2.

3. He admits the allegations of paragraph 3.

4. He admits that at the time of the filing of this action, the allegations in this paragraph were true.

5. He admits the essentiality of commercial banks to the economy. He denies that commercial banks are unique in view of the substantial competition encountered from other financial institutions.

6. He admits the allegations of paragraph 6.

7. He admits the allegations of paragraph 7 to have been true at the time of filing the complaint.

8. He admits the allegations of paragraph 8 to have been true at the time of the filing of the complaint.

9. He denies that banking in Nashville is heavily or unduly concentrated. He admits that Third National was and is the second largest and that Nashville Bank was the fourth largest bank at the time of the filing of this action. Because of the lack of definition in the complaint of "area" [fol. 57] or "metropolitan Nashville" the intervenor is without sufficient knowledge to admit or deny the remaining allegation of paragraph 9 and leaves the plaintiff to its proof.

10. The intervenor denies that there is an unduly high degree of concentration in banking as alleged in paragraph 10. Admissions as to the size of the defendant banks is contained in prior answers.

11. Because of the failure of the plaintiff to define the

areas alleged the intervenor neither admits nor denies the statistics relating to such areas and leaves the plaintiff to its proof.

The intervenor has no knowledge as to the total amount of trust business in the "Nashville area" and is, therefore, unable to admit or deny the plaintiff's allegations and leaves the plaintiff to its proof.

The intervenor does admit that the relative standing of Third National of Nashville has not changed among banks located in the City of Nashville despite the merger.

12. The intervenor denies that Third National and Nashville Bank are or were major banking competitors in any area of the country and denies that any significant competition existed between them prior to the merger.

13. He admits the allegation of paragraph 13.

14. He denies that Third National and Nashville Bank have engaged in an unlawful combination in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act as alleged in paragraph 14.

15. He denies the allegations of paragraph 15.

16. He denies the allegations of paragraph 16.

17. He denies the allegations of paragraph 17.

18. He denies each and every allegation contained in paragraph (a), (b), (c) and (d).

19. He denies each and every allegation not hereinabove admitted or denied as fully as if set out in detail and denied.

[fol. 58] Prayer

1. The complaint of the United States of America was filed prior to the enactment and signing into law of the amendments to 12 U.S.C. 1828(c) on February 21, 1966.

2. The plaintiff, in attacking the decision of the agency charged with responsibility for approval of bank mergers under the terms of the aforementioned statute, has made no effort to present to the Court its assessment of the needs and convenience of the community which the Court is required, by statute, to review.

3. The only decision before the Court which balances the needs and convenience to the community against the effect upon competition of the merger, which is the subject of this action, is the opinion of the Comptroller of the Currency, who is the responsible regulatory agency in this case.

4. As the plaintiff has presented no allegation to contradict or overcome the decision of the Office of the Comptroller of the Currency that the community's convenience and needs clearly outweigh the non-existent adverse effect upon competition of the subject merger, it has stated no cause of action.

Wherefore, the intervenor prays that this complaint be dismissed.

/s/ Charles H. McEnery. /s/ Joseph J. O'Malley. /s/ Franz F. Opper, Attorneys for James J. Saxon, Comptroller of the Currency.

Dated: March 8, 1966.

[fol. 59] [File endorsement omitted]

Exhibit GX-1000

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

Civil Action No. 3849

[Title omitted]

STIPULATIONS OF FACT—Filed April 27, 1966

Plaintiff and defendants, through their respective counsel, hereby stipulate that witnesses, if called, would testify to the following facts. It is expressly understood and agreed that:

(a) Nothing in this stipulation shall be construed to preclude either plaintiff or defendants from offering any evidence relevant to any issue in this case, including evidence which may be related to but does not contradict the particular facts herein stipulated;

(b) The stipulated facts or any of them may be offered in evidence by plaintiff or defendants at any time during the trial of this case whether prior or subsequent to the completion of plaintiff's case.

[fol. 60] I. Facts

1. Nashville Bank and Trust Company, a banking association, was organized under the laws of the State of Tennessee, with its principal place of business at 315 Union Street, Nashville, Tennessee, and a branch in Davidson County. It was a commercial bank.

2. Nashville Bank and Trust Company was chartered by the State of Tennessee as the Nashville Trust Company on July 6, 1889. On September 9, 1889, the new institution with an original capital of $250,000.00, opened for business. In 1900 a savings department was opened. A banking department which would accept checking accounts followed in 1901. As a result of successive increases in capitalization, Nashville Bank and Trust Company had a capital of

$1,633,300 and a surplus of $1,700,000 and undivided profits of $1,028,546 as of December 20, 1963.

3. On May 8, 1956, an amendment to the charter was issued changing the name to the Nashville Bank and Trust Company. Since the bank was founded originally as a trust institution, commercial banking activities have been a comparatively recent development and have been confined primarily to the immediate community served.

4. As of the date of the filing of the Complaint, Nashville Bank & Trust Company was the fourth largest commercial bank in Davidson County in terms of assets.

5. Third National Bank is a banking association organized under the laws of the United States with its principal place of business at 170 4th Avenue North, Nashville, Tennessee, and all of its branches in Davidson County. It is a commercial bank offering a comparative full line of banking services.

[fol. 61] 6. Third National Bank was chartered as a National Banking Association on July 14, 1927 and opened for business on July 18, 1927 with a capital of $600,000 and surplus of $120,000. As a result of successive increases in its capitalization Third National Bank had a capital of $6,000,000, and a surplus of $14,000,000 as of December 20, 1963.

7. As of the date of the filing of the Complaint Third National Bank was the second largest commercial bank in Davidson County in terms of assets.

8. Prior to the merger of Third National Bank and Nashville Bank & Trust Company there were eight banks located in Davidson County. Six of these banks were headquartered in downtown Nashville.

9. As a result of this merger, there are seven banks located in Davidson County, five of which maintain head offices in downtown Nashville.

10. "Commercial banking" means the aggregation of products and services in which commercial banks deal. The principal banking products are various kinds of bank credit such as unsecured personal and business loans, mortgage loans, loans secured by securities or accounts receivable, automobile installment and consumer goods installment loans, tuition financing, bank credit cards, and revolving credit funds. Banking services include acceptance of de-

mand deposits from individuals, corporations, governmental agencies, and other banks; acceptance of time and savings deposits; estate and trust planning and trusteeship services; lock boxes and safety deposit boxes; account reconciliation services; foreign department services (acceptance and letters of credit); correspondent service and investment advice.

[fol. 62] 11. (Unacceptable)

12. At the time of the merger and for many years prior thereto, Third National Bank and Nashville Bank & Trust Company were each engaged in commercial banking in interstate commerce.

13. Services offered by both NB&T and Third during the period January 1, 1961 through August 17, 1964 were as follows:

Deposit Functions

Checking
Savings
Automatic Savings
Certificates of Deposit
Christmas Club
Bank-By-Mail
Night Depository
Drive in Windows
Certified Checks

Depository For

Court Funds
School Funds
Social Security Depository Receipts
State and County Funds
State Sales Tax
Withholding Tax

[fol. 63] Loans

Accounts Receivable
Appliances
Automobiles
Boats, Motors, Trailers
Bus

Commercial
Commodity
Construction
Floor Plan Financing for Dealers *
Education
Equipment
G.I. Farm
G.I. Homes
FHA Home Improvement
FHA Mortgage
Home Modernization
Insurance Premium
Life Insurance
Lines of Credit
Medical and Dental Expense
Mortgages
Personal
Property Improvement
Real Estate
Small Business
Tax Payment
Warehouse Receipt
Mortgage Servicing
Tractor Trailers
Trucks
Mortgage Warehousing
Trailers

Safe Deposit
Lock Boxes
Valuable Storage

---

* This is listed as a service offered by both banks; however, Nashville Bank & Trust Company had only one dealer for which floor plan financing was handled and that was Cumberland Motors, which involved a special relationship. Nashville Bank & Trust Company did not go into floor planning as a general practice.

Investments

Bond Purchase
Bond Sales
Investment Counsel

Other Services

Bank Drafts
Bills of Lading
Cashiers Checks
Customer Parking
Draft Collection
Guarantee Signatures
Industrial Development Assistance
Letters of Credit
Letters of Introduction
[fol. 64] Note Collection
Savings Bonds
Supplying Credit Information for Customers
Check Collection
Credit Life Insurance
Travelers Checks
Wire Fund Transfers
Business Assistance
Financial Advice
Committeeships

14. Third National Bank has been very active in the field of correspondent banking, having approximately 365 correspondent bank accounts prior to the merger. Nashville Bank and Trust Co. has functioned in a more limited manner as a correspondent bank.

15. The legal lending limit of Third National Bank as of December 20, 1963 was $2,000,000. The legal lending limit of Nashville Bank & Trust Co. as of that date ranged from $654,000 to $1,090,000. (The Tennessee Code, Sec. 45-426, limits a state-chartered bank from making any single loan in excess of 15% of its capital, surplus, and undivided profits; provided that loans in excess of that percent but not above 25% may be made if approved in advance by the board of directors or finance committee of said bank).

16. In 1936, Third National Bank purchased the building in which it was then located, together with an adjacent lot, and remodeled the building and built a 12-story addition; in 1926, Nashville Bank and Trust Company completed and occupied its present main office building, adjoining its earlier quarters on Third Avenue North.

17. Branch banking in Tennessee is limited to the county in which the principal office of a bank is located and its principal banking business is transacted. (Tennessee Code, Sec. 45-211.)

[fol. 65] 18. Locations of banking offices in Davidson County as of April 27, 1964 were as follows:

a. Third National Bank

1) Main Office
170 4th Avenue North
Nashville, Tennessee
2) Church Street Branch
717 Church Street
3) West Nashville Branch
4604 Charlotte Avenue
Nashville, Tennessee
4) East Nashville Branch
600 Gallatin Road
Nashville, Tennessee
5) West End Branch
1715 West End Avenue
Nashville, Tennessee
6) South Nashville Branch
300 Lafayette Street
Nashville, Tennessee
7) Madison Branch
Madison, Tennessee
8) Green Hills Branch
3811 Hillsboro Road
Nashville, Tennessee
9) Woodbine Branch
2915 Nolensville Road
Nashville, Tennessee
10) Donelson Branch
Donelson, Tennessee

11) Melrose Branch
2531 Franklin Road
Nashville, Tennessee
12) Dickerson Road Branch
1501 Dickerson Road
Nashville, Tennessee
13) Airport Branch
Nashville, Municipal Airport
Nashville, Tennessee
14) Belle Meade Branch
4304 Harding Road
Nashville, Tennessee
15) Capitol Hill Branch
442 James Robertson Pkwy.
Nashville, Tennessee.

[fol. 66] b. Nashville Bank and Trust Co.

1) Main Office
315 Union Street
Nashville, Tennessee
2) Murfreesboro Road at
Thompson Lane,
Nashville, Tennessee

c. Bank of Goodlettsville
Goodlettsville
Tennessee

d. Capital City Bank

1) Main Office
219 4th Avenue, North
Nashville, Tennessee
2) Church Street Branch
2010 Church Street
Nashville, Tennessee

e. Citizens Savings Bank
and Trust Company
345 4th Avenue, North
Nashville, Tennessee

f. Commerce Union Bank

1) Main Office
400 Union Street
Nashville, Tennessee
2) Belle Meade Office
4405 Harding Road
Nashville, Tennessee
3) Bordeaux Office
3201 Hydes Ferry Road
Nashville, Tennessee
4) Broadway Office
300 Broadway
Nashville, Tennessee
5) Deaderick Office
4th & Deaderick Street
Nashville, Tennessee
6) Donelson Office
Lebanon Road
Nashville, Tennessee
7) Fourth and Lafayette Office
823 4th Avenue, South
Nashville, Tennessee
8) Madison Office
Madison, Tennessee
[fol. 67] 9) Ninth Avenue Office
109 9th Avenue
Nashville, Tennessee
10) Uptown Office
212 Capitol Blvd.
Nashville, Tennessee
11) Seventeenth & Church Office
1634 Church Street
Nashville, Tennessee
12) Thompson Lane Office
602 Thompson Lane
Nashville, Tennessee

g. First American National Bank

1) Main Office
326 Union Street
Nashville, Tennessee

2) Melrose Branch
2535 Franklin Road
Nashville, Tennessee
3) Church Street Branch
611 Church Street
Nashville, Tennessee
4) 808 Broadway Branch
808 Broadway
Nashville, Tennessee
5) 301 Broadway Branch
301 Broadway
Nashville, Tennessee
6) West Nashville Branch
5100 Charlotte Avenue
Nashville, Tennessee
7) Hillsboro Branch
1700 21st Avenue, South
Nashville, Tennessee
8) North Nashville Branch
901 Monroe Street
Nashville, Tennessee
9) Tenth and Woodland Branch
1001 Woodland Street
Nashville, Tennessee
10) Centennial Park Branch
2609 West End Avenue
Nashville, Tennessee
11) Stock Yards Branch
901 Second Avenue, North
Nashville, Tennessee
[fol. 68] 12) Woodbine Branch
2513 Nolensville Road
Nashville, Tennessee
13) Murfreesboro Road Branch
410 Murfreesboro Road
Nashville, Tennessee
14) Belle Meade Office
Harding Road at
White Bridge Road
Nashville, Tennessee

15) Green Hills Branch
3821 Green Hills Village Dr.
Nashville, Tennessee
16) Old Hickory Branch
Old Hickory
Tennessee
17) Madison Branch
Madison
Tennessee
18) Donelson Branch
Donelson
Tennessee

h. Whites Creek Bank and
Trust Company
White Creek, Tennessee

[fol. 69] OK—Subject/Verification of Figures.

19. The bulk of the IPC deposits of each commercial bank located in Davidson County originate from customers having residence or business addresses within Davidson County. The following are the percentages of such deposits, according to number of accounts and dollar value, held by each such bank as of December 20, 1963:

Name of Bank	Demand		Savings		Time	
	No. of Accounts	Value	No. of Accounts	Value	No. of Accounts	Value
Third National	90.-	72.3	81.-	83.-	55.0	25.0
Nashville Bank & Trust	89.-	90.-	83.-	90.-	92.0	73.0
First American National	91.3	79.3	92.6	90.5	66.0	25.7
Commerce Union	40.6	53.0	52.1	46.4	28.4	57.9
Capital City	94.7	94.0	93.8	92.2	72.9	72.1
Bank of Goodlettsville	55.6	73.1	65.2	66.3	66.7	64.5
Citizens Savings	98.6	97.8	62.5	90.0	84.2	69.9
White's Creek	76.0	92.2	87.0	89.7	100.0	100.0

[fol. 70] 20. According to the 1960 Census, Davidson County had a population of 399,743, an increase of 24.2 per cent since 1950. The growth rate of the counties adjacent to Davidson County during this period was 9.6 per cent, and the growth rate of the states of Alabama, Kentucky, Mississippi and Tennessee was 5 per cent during this same period. The Nashville area Chamber of Commerce estimated the 1963 population of Davidson County at 423,150.

21. The economy of Davidson County is based primarily on industry, finance, commerce and agriculture. Nashville as the capital of the State of Tennessee is a major governmental center and the regional headquarters for several federal agencies. In addition, it is the headquarters of numerous educational institutions of higher learning and national religious organizations.

22. Non-farm employment totaled 144,800 in 1962, an increase of more than 55 per cent since 1949. Of this total 27.8 per cent was employed in manufacturing industry, 22.3 per cent in trade, 15.9 per cent in services and 14.5 per cent in government at both the state and federal levels.

23. The future growth potential of the Nashville-Davidson County area is enhanced by the following factors:

a. Nashville's continuing role as the geographical and financial center of a growing region will result in a certain amount of automatic growth.

b. The existing complement of specialized enterprises have a vast potential for growth in themselves.

c. Nashville is favored with a heavy concentration of services-producing activities, which, coupled with a national trend in the direction of increased services will place the area in a highly favorable position to capitalize on this factor.

d. The area enjoys an abundance of relatively low-cost [fol. 71] and efficient labor which will continue to attract new industries as it has in the past.

e. TVA-supplied electric power will be of invaluable assistance in allowing the area to reach its maximum industrial potential.

f. The ready access to Nashville from both the east and west coasts via jet airliners, major truck lines, and rail facilities will offer continued opportunities to develop Nashville as a center for supplying and servicing a broad geographic area.

g. The abundant water supply augmented by the construction of Barkley Dam, Percy Priest Dam, and others will allow transportation of goods via the nation's major waterways and also will further industrial development.

h. Nashville currently is serviced by two major natural

gas pipelines, and a petroleum line will be opened later this year. Indeed, the area has been said to be the cross-roads of TVA power and natural gas.

i. Nashville represents a seedbed concentration of urban markets capable of generating and supporting a number of local market-oriented industries.

24. Experts predict increased output of goods and services may be expected to range from about 30% in transportation, communication and utilities to about 150% in wholesale trade between 1962 and 1970 with a substantial increase for the subsequent decade. It is further estimated that employment gains can be expected to range from 25,000 to 36,100 between 1962 and 1970 and from 34,000 to 49,000 between 1970 and 1980 in Nashville alone. The non-farm employment in Nashville is expected to be able to support a population in Nashville of 467,000 in 1970 and 581,000 in 1980. Per-capita income is expected to rise from a 1962 level of $2,295 to a 1970 level of $2,770, and to $3,360 in 1980.

[fol. 72] 25. The Third National Company is a corporation affiliated with Third National Bank. Its shares are held by trustees for the benefit of the shareholders of Third National Bank. The trustees are all officers of Third National Bank. It is engaged primarily in the business of making and servicing mortgage loans.

26. Third National Bank refers a considerable number of its customers to Third National Company when such customers wish to purchase or receive a mortgage loan. A number also go to Third National Company without bank referral.

27. It is estimated that about 80% of the volume of loans handled by Third National Company are either for the bank or are for customers of the bank. Third National Company also renders an insurance agency service to the finance department of Third National Bank. The operations of Third National Company are not reflected to any extent in the financial statements of Third National Bank.

28. (Omit.)

29. In November 1963 Mr. William C. Weaver first entered into serious discussions with Mr. H. G. Hill, Jr. and Mr. W. S. Hackworth relative to the possible sale of the

H. G. Hill Company's interest in Nashville Bank and Trust Company to Mr. Weaver.

30. Subsequently, in a letter to Hill and Hackworth dated January 11, 1964, Weaver set out the terms—previously agreed to orally by which he would purchase from the H. G. Hill Company and Hackworth, 10,845 shares of the capital stock of Nashville Bank & Trust Company at $350 per share with a closing date no later than April 30, 1964. These terms were accepted by Hill and Hackworth with minor changes on January 14, 1964.

[fol. 73] 31. In early February 1964 Weaver had a discussion with Mr. Edward Potter, Jr., chairman of the board and Mr. William Earthman, president of Commerce Union Bank, concerning a loan to Weaver for the purchase of the Nashville Bank & Trust Company shares. During this meeting Potter and Earthman indicated that they were anxious to merge with Nashville Bank & Trust Company. Subsequent to this initial conversation, Commerce Union representatives prepared some financial figures and requested another meeting with Weaver.

32. This second meeting was attended by Mr. Earthman, Mr. David K. Wilson, a director of Commerce Union, and Mr. Louis Phillips, vice-chairman of the board. Mr. W. H. Criswell, one of Weaver's business associates who had participated in the purchase of the Nashville Bank & Trust Company stock, was also present. The representatives of Commerce Union presented some figures for the exchange of stock on the basis of ten shares of Commerce Union for each share of Nashville Bank & Trust. But the exchange rate was not acceptable to Weaver and he doubted that his associates would find it acceptable. Some time in mid-February these negotiations broke down and were terminated.

33. On about February 12, 1964 at a gathering which preceded the National Life and Accident Insurance stockholders meeting, Mr. Sam Fleming, President of Third National Bank, mentioned to Weaver that if he were considering the sale or merger of Nashville Bank & Trust Company to bear in mind that Third National Bank was interested in discussing the matter with him. On at least three separate occasions later than month Fleming pursued the matter of a possible merger of Nashville Bank & Trust

Company with Third National Bank. On March 4, 1964, Weaver attended a luncheon at Third National Bank at which Fleming outlined the terms of a possible merger of the two institutions. The following day at Weaver's request Fleming addressed a formal offer to purchase the Nashville Bank & Trust Company stock held by Weaver and his associates to Weaver.

[fol. 74] 34. On March 11, 1964, Weaver and his associates consummated the January 1964 agreement with Hill and Hackworth and received 10,845 shares of common stock of Nashville Bank & Trust Company in exchange for bank checks in the amount of $3,795,750.

35. On March 12, 1964 resolutions were adopted by the boards of directors of Third National Bank and Nashville Bank & Trust Company approving the merger agreement of the same day between said banks.

36. The merger agreement provided, *inter alia,* for an exchange of 4½ shares of stock of Third National Bank for each share of stock of Nashville Bank & Trust Company.

37. On March 13, 1964 the merger was announced, and it was consummated on August 18, 1964.

/s/ J. L. Minicus. /s/ Robert C. Weinbaum. /s/ Francis G. McKenna, Attorneys, Department of Justice.

/s/ Frank M. Farris, Jr., Attorney for defendant banks.

Dated: October 15, 1965

(Revision: April 26, 1966)

[fol. 75] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION.

Civil Action No. 3849

UNITED STATES OF AMERICA, Plaintiff,

v.

THIRD NATIONAL BANK OF NASHVILLE AND NASHVILLE BANK AND TRUST COMPANY, Defendants.

and

THE COMPTROLLER OF THE CURRENCY, Intervenor

OPINION—November 22, 1966

This action was instituted August 10, 1964 by the United States, acting through the Department of Justice, under §4 of the Sherman Act, 15 U.S.C.A. §4, and §15 of the Clayton Act, 15 U.S.C.A. §25, to enjoin the proposed merger of the Third National Bank in Nashville (Third National) and the Nashville Bank & Trust Company (Trust Company). Violations of §1 of the Sherman Act, 15 U.S.C.A. §1, and §7 of the Clayton Act, 15 U.S.C.A. §18, were charged in the complaint. Acting pursuant to the Bank Merger Act of 1960, 12 U.S.C.A. §1828(c), the Comptroller of the Currency, notwithstanding adverse reports on the competitive factors involved from the Attorney General, the Federal Reserve Board, and the Federal Deposit Insurance Corporation, approved the merger on August 4, 1964 on the basis of a written opinion and detailed findings of fact. Plaintiff's motion for a preliminary injunction was heard August 14 and 15, 1964; it was denied August 18, 1964; and [fol. 76] the merger was consummated that same day. Before trial on the merits and after extensive pre-trial proceedings in this action, Congress enacted Public Law 89-356, 80 Stat. 7, as an amendment to §18(c) of the Federal Deposit Insurance Act, 12 U.S.C.A. §1828(c). The Amendment, approved February 21, 1966 and referred to as the Bank Merger Act of 1966, effected material changes in the 1960 Bank Merger

Act. By §2(c) the Amendment was made applicable to pending antitrust actions involving bank mergers consummated after June 16, 1963. The significance of that date was that the Supreme Court of the United States then rendered its opinion in *United States* v. *Philadelphia National Bank, et al.*, 374 U.S. 321, holding that the Bank Merger Act of 1960 did not, by directing the banking agencies to consider competitive factors before approving bank mergers, immunize mergers approved by them from later judicial challenge under the antitrust laws. Despite prior approval by the Comptroller of the merger of the second and third largest commercial banks in *Philadelphia*, the Court held the proposed merger to be forbidden by §7 of the Clayton Act and such merger was accordingly enjoined. So, absent the 1966 Amendment, the Court's only task in this case would be to determine whether the merger now under scrutiny runs afoul of antitrust laws without regard to any of the banking factors enumerated in the 1960 Act. It is clear, however, that the Amendment introduces new standards to be applied by the banking agencies, by the Department of Justice, and by the courts alike. It reflects the congressional attempt to reconcile the judicial [fol. 77] application of antitrust concepts with the standards applied by federal banking agencies in evaluating merger applications under the 1960 Act. By §18(c)(5)(B) of the Federal Deposit Insurance Act, as amended by the 1966 Amendment, it is provided that the responsible agency shall not approve any proposed merger transaction which shall violate the specified antitrust standards "unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." The Amendment then proceeds in the immediately following paragraph: "In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served."[1]

---

[1] Sec. 18 (c)(5) of the Federal Deposit Insurance Act as amended by the 1966 Amendment provides:

In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

[fol. 78] By §18(c)(7)(B) it is provided that the "standards" applied by the courts in antitrust actions attacking bank mergers "shall be identical with those that the banking agencies are directed to apply under paragraph (5)," and by §2(c), courts are directed to "apply the substantive rule of law set forth in §18(c)(5) of the Federal Deposit Insurance Act, as amended by this Act" in all antitrust litigation pending before them on and after the date of enactment of the 1966 Amendment with respect to all mergers consummated after June 16, 1963, the date of the Supreme Court decision in *Philadelphia.*

Thus from the terms of the Amendment as well as from its legislative history,[2] the basic congressional intent in enacting the 1966 Amendment appears to be clearly mirrored: Bank mergers must be examined and analyzed by the agencies and by the courts in terms of the antitrust standards prescribed in the Amendment, such analysis to include consideration of the enumerated special banking factors, and any violations of such standards shall constitute a barrier to bank mergers unless "clearly outweighed

---

The responsible agency shall not approve—

(A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

[2] H.R.Rep. 1221, 89th Cong. 2d Sess. (1966), Bank Merger Act Amendment.

in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." "In every case," as the Amendment explicitly provides, there shall be taken into account "the [fol. 79] financial and managerial resources and future prospects of the existing and proposed institutions and the convenience and needs of the community to be served." The banking industry is thus recognized as occupying a unique place in our national economy requiring a specialized set of antitrust standards, and under prescribed conditions exemption from the operation of antitrust consequences altogether with the exception of those prescribed in §18 (c)(5)(A).

Before adverting to the merits of this case, it becomes necessary to resolve a problem of procedure. This problem arises because the Comptroller formally approved the merger prior to the 1966 Amendment and in the light of the factors of the Bank Merger Act of 1960. While the 1960 Act required him to consider anticompetitive effects, it did not require him to accord this factor any particular weight or to determine antitrust issues per se.[3]

[fol. 80] In *United States* v. *Crocker-Anglo National Bank, et al.*, C.A. 41,808, United States District Court, Northern District of California, 35 L.W. 2209, a three-judge court rendered its opinion on October 6, 1966 in one of the three

---

[3] The 1960 Bank Merger Act applied to all banks insured by the Federal Deposit Insurance Corporation and banking agencies in considering merger applications were required to evaluate:

(1) The financial history and condition of each of the banks involved; (2) the adequacy of its capital structure; (3) its future earnings prospects; (4) the general character of its management; (5) the convenience and needs of the community to be served; (6) and whether or not its corporate powers are consistent with the purposes of this chapter . . . the appropriate agency shall also take into consideration the effect of the transaction on competition (including any tendency toward monopoly) and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest. (12 U.S.C.A., §1828(c) (1964).

post Philadelphia cases pending at the date of the enactment of the 1966 Amendment in which mergers had been consummated after the *Philadelphia* decision. The other two pending cases were the present case and a case pending in St. Louis. Although mergers consummated before the *Philadelphia* decision were exempted from Sherman §1 and Clayton §7, the new antitrust standards of the 1966 Amendment were made to apply to all mergers consummated after that decision, including those challenged in the three pending cases, as we have seen. In *Crocker-Anglo,* as in this case, the Comptroller of the Currency had approved the merger prior to the 1966 Amendment by applying the different criteria of the 1960 Bank Merger Act. He had not assessed its validity under the standards of the 1966 Amendment. The California Court, pointing out that under §18 (c)(7)(A) courts are directed to "review de novo the issues presented" in actions under the 1966 Amendment, stated:

> No difficulty would be presented here so far as reviewing *de novo* the first of these determinations for this court has traditionally adjudged whether mergers have anticompetitive effects. But the problem of reviewing the second determination by the Comptroller, namely, whether the proposed transaction is outweighed in the public interest, and whether it meets the convenience and needs of the community, is plainly and unquestionably a legislative or administrative determination of a type which this court, as a constitutional court, is prohibited from deciding.

[fol. 81] Entertaining this view the Court construed the 1966 Amendment as limiting the Courts' role in pending cases as well as in all future cases to a review of the findings made by the Comptroller pursuant to the 1966 criteria. As there were no such findings by the Comptroller before the court in *Crocker-Anglo,* it was directed that the action be remanded to the Comptroller to update his findings and conclusions under and in the light of the new standards of the 1966 Amendment. It was intimated in the opinion that the court's power to review such findings as to anticompetitive effects would be somewhat broader in scope than its power to review the Comptroller's findings that anticompetitive effects are "clearly outweighed in the public

interest," or as to what constitute the "conveniences and needs of the community to be served." As to the latter, the courts would be restricted to a "determination of questions of law and ascertainment of whether findings of fact by the agency are supported by substantial evidence," taking into account not only the evidence before the Comptroller but also any additional evidence made a part of the record at the trial. The *Crocker-Anglo* interpretation of the 1966 Amendment as to the scope of the judicial function in the three cases pending at the time of its enactment is supported by a carefully reasoned opinion, although it must be conceded that the issue of statutory interpretation is not free from difficulty. In any event it is not deemed necessary in this action to follow the example of the California [fol. 82] Court in remanding the action to the Comptroller for findings specifically formulated under the new criteria of the 1966 Amendment. In *Crocker-Anglo* the trial occurred before the effective date of the 1966 Amendment, and that court accordingly did not have before it any findings by the Comptroller assessing the merger on the basis of the newly enacted standards. Under such circumstances, it was the court's view that a remand to the Comptroller for updating his findings and conclusions was the proper and expedient course to follow. In contrast, the present action was tried after the 1966 Amendment and the Comptroller's assessment of the present merger under the new criteria and standards of the Amendment has been presented to the Court in various ways. First, having intervened as a party to the action under the provisions of the 1966 Amendment allowing such intervention as of right, (§18(c)(7)(D) of the Federal Deposit Insurance Act, as amended), he has filed a formal answer setting forth his views that the merger is not substantially anticompetitive when evaluated under the terms of the 1966 Amendment, and that any anticompetitive effects are clearly outweighed in the public interest by the convenience and needs of the community to be served. The same views and opinions have been presented to the Court by the Comptroller, acting through his attorney, at various stages during the trial, including the making of oral arguments, the filing of written briefs, and the filing of suggested findings of fact [fol. 83] and conclusions of law to be approved by the Court.

Of greater significance, however, is the fact that the Comptroller appeared as a witness at the trial and expressed the same views and opinions in response to numerous questions on direct and cross examination. His testimony convincingly demonstrated that he was entirely familiar not only with the new standards of the 1966 Amendment, but also with the essential and material facts which had been developed at the trial. Like testimony was given by the Regional Comptroller of the Currency. There is no reason to conclude that these steps were not taken by the Comptroller in good faith. Nor are the Comptroller's opinions expressed as a witness under oath entitled to any less weight because he saw fit to intervene as a party in the action. If he concluded that the merger met the tests of the 1966 Amendment, as he obviously did, it was his right, if indeed it was not his duty, to intervene in the action to support that conclusion and to make his views, opinions and findings known to the Court.

The trial was a protracted one, extending over approximately six weeks and involving some 3,800 pages of transcript. A remand to the Comptroller could only serve the purpose of further delay. It is idle to suppose that any further significant evidence could be unearthed, or that the Comptroller would be likely to come to any different conclusion, or that he could have any better grasp of the controlling facts that he possessed at the trial. Since the purposes of a remand have been substantially accomplished in the manner indicated, and since the Comptroller's find-
[fol. 84] ings and opinions are before the Court under both the 1960 Bank Merger Act and the 1966 Amendment, the Court concludes that the remand procedure is not required.

What, then, is the scope of judicial review? Applying the rationale of the *Crocker-Anglo* opinion, the Court's review of anticompetitive effects should be broader than "public interest" and "convenience and needs." The banking agency's finding on the first issue should be accorded some weight in view of its expertise and the technical and complex nature of the banking industry, but since a violation of antitrust standards is primarily a legal issue which courts have traditionally considered they should make an independent determination with respect to it. On the other hand, since the question whether anticompetitive

effects are outweighed in the public interest by the convenience and needs of the community is, in the language of the *Crocker-Anglo* opinion, "plainly and unquestionably a legislative or administrative determination . . .," the Comptroller's findings should not be disturbed unless they are unsupported by substantial evidence. This view finds strong support in the statement of the Supreme Court in *Philadelphia,* at p. 371:

> We are clear, however, that a merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence. . . .

[fol. 85] In seeking to void the merger under investigation the plaintiff relies upon Section 1 of the Sherman Act as construed in *United States* v. *First National Bank of Lexington,* 376 U.S. 665 (1964), and upon Section 7 of the Clayton Act as construed in *United States* v. *Philadelphia National Bank, supra.* As in *Lexington* and *Philadelphia,* the plaintiff's case rests primarily upon inferences derived from statistics and upon the rules of prima facie invalidity enunciated in those cases. It is argued that the merging banks were "major competitive factors" in the relevant Davidson County market, that the merger resulted in the elimination of competition between them, and, consequently, that the case falls squarely within the ambit of the Supreme Court ruling in *Lexington* under Section 1 of the Sherman Act. A fortiori, it is argued that the merger is forbidden under the less stringent provisions of Clayton Section 7. It is further insisted, independently of the Sherman Act, that the merger must fall under Clayton Section 7 standards as delineated in *Philadelphia,* in that (a) the merger has produced a firm controlling an undue percentage share of the relevant market, and (b) it has resulted in a significant increase in the concentration of firms in that market. It is therefore said that the merger "is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." In this case the plaintiff says that there is

no such countervailing evidence. Plaintiff also relies upon [fol. 86] the statement in a footnote of the *Philadelphia* opinion that "if concentration is already great, the importance of preventing even slight increases in concentration . . . is correspondingly great." Plaintiff would drastically minimize the effect of the 1966 Amendment. Its position as to the impact of the Amendment is thus succinctly stated in its trial brief.

> The 1966 Amendment did not change materially the tests of antitrust legality applicable in bank merger cases. The Act was designed primarily (1) to require the bank supervisory agencies to give more weight than heretofore to the competitive factor in ruling on future merger applications, (2) to remove any impression that the standards of Philadelphia and those of the Bank Merger Act of 1960 differ in fact and (3) to make it clear that, as suggested in Philadelphia, limited recognition was to be given to the special features of commercial banking in terms of consideration of the "banking factors"—primarily a failing company doctrine with "somewhat larger contours," Philadelphia National Bank, supra, 374 U.S. at 372 n. 46.

Taking notice of the suggestion in the *Philadelphia* opinion that the failing company doctrine may have somewhat larger contours in the banking area, the plaintiff would construe the banking factors enumerated in the 1966 Amendment as being concerned primarily with the question of solvency and protection of the community against a failing bank. This is true, as the plaintiff insists, not only with respect to financial and managerial resources, but also with respect to the concept of convenience and needs of the community.

The plaintiff's restrictive interpretation of the 1966 Amendment finds little support either in legislative [fol. 87] history or in the text of the Amendment itself. On the contrary, both legislative history and the textual provisions of the Amendment strongly indicate that it was the intent of Congress to effect substantial changes in existing antitrust law relative to bank mergers as enunciated in the *Lexington* and *Philadelphia* cases. *United States* v. *Crocker-Anglo National Bank, et al., supra.* After the

decision in the *Philadelphia* case, the validity of bank mergers was made to depend in the final analysis, if challenged in the courts, upon the application of traditional antitrust standards. Except for the vague intimation that the failing company doctrine might have somewhat larger contours in bank merger cases, no consideration was to be given in an action challenging bank mergers under antitrust laws to the special banking factors contains in the 1960 Bank Merger Act. Essentially what the 1966 Amendment does is to change this ultimate test of validity from one depending strictly upon antitrust laws to a test balancing antitrust considerations with the special factors recognized by Congress as peculiarly applicable to the banking industry. The House Report on the 1966 Bank Merger Amendment clearly sustains this view. Under the heading, "What the Bill Would Do," it is stated that it would establish a single set of standards for the consideration of future mergers by the responsible banking supervisory agencies, the Department of Justice, and the courts under the antitrust laws—standards stricter than those in the Bank Merger Act "but which include both the effect on [fol. 88] competition and the convenience and needs of the community to be served," a standard clearly different from that of the *Lexington* and *Philadelphia* cases.

It is pointed out under the heading, "The Need for the Legislation," that the committee had heard the contention made that banking is such a unique industry and that the determination of where the public interest lies in a given bank merger situation requires such special expertise that any bank merger which has been approved by the appropriate federal supervisory agency should be absolutely immune from antitrust attack. On the other hand, the committee had heard the contention advanced with equal vigor that any bank merger whose effect would be to lessen competition should on that ground alone be absolutely prohibited, and that neither agencies nor courts should be permitted to examine the question of whether the overall effect of such merger might be in the public interest.

Under the heading "Purpose of the Bill," the floundering bank problem is discussed as follows:

> Under general antitrust law criteria, particularly as they have been developed over the past few years, the

banking agencies find it difficult to deal as they would like with the floundering bank problem in medium to smaller sized communities. The problem arises where there is a relatively small number of banks, and one or more of these banks appear to be stagnating. It may be because it is below the economic minimum size to attract capable and vigorous management personnel, it may be because it is closely held by owners who insist on unrealistically conservative policies, or it may be for any other reasons which are discernible [fol. 89] only by an examination of that particular bank as an individual institution. The banking agencies, with some differences in degree among themselves, have contended that they should be able to consider a merger application on the basis of such an individual examination, and to approve it if they believe that the result would be a more vigorously competing institution, furnishing better overall service to the community, even though the reduction in the number of competing units, or the concentration in the share of the market in one or more lines of commerce, might result under general antitrust law criteria in a substantial lessening of competition.

As to the intended legal effect of the Bill, the House Report proceeds:

First, it is intended to make clear that no merger which would violate the antimonopoly section (sec. 2) of the Sherman Anti-Trust Act may be approved under any circumstances.

Second, the bill acknowledges that the general principle of the antitrust laws—that substantially anticompetitive mergers are prohibited—applies to banks, but permits an exception in cases where it is clearly shown that a given merger is so beneficial to the convenience and needs of the community to be served—recognizing that effects outside the section of the country involved may be relevant to the capacity of the institution to meet the convenience and needs of the community to be served—that it would be in the public interest to permit it.

Third, the bill provides that this rule of law is to

be applied uniformly, in judicial proceedings as well as by the administrative agencies.

Turning to the text of the 1966 Amendment, it becomes even clearer that bank mergers are sui generis, to be assessed as to anticompetitive effects not alone on the basis of the quantitative analyses of the *Lexington* and [fol. 90] *Philadelphia* cases, but, in addition, by taking into account all material factors with respect to each institution in the setting of the relevant market, and by evaluating the special banking factors delineated in §18(c)(5)(B). By that section, as we have seen, not only may anticompetitive effects be outweighed by the convenience and needs of the community to be served, but responsible agencies and courts alike are mandated to take into consideration "in every case" the following special factors:

(1) Financial resources of the existing and proposed institution;
(2) Their managerial resources;
(3) Their future prospects; and
(4) The convenience and needs of the community to be served.

There is nothing in the language of this section to indicate that the special banking factors were to be given limited recognition only, or that they were to be concerned primarily with the question of solvency. It is clear that the factors embrace the problem of the failing bank as well as that of the "floundering" or "stagnating" bank. Certainly possible insolvency is an important consideration, but it may be of equal importance to the economy to eliminate a bank which has reached a point of deterioration or stagnation and to permit its merger with a "more vigorously competing" institution. Are the cases of floundering banks the "somewhat larger contours of the failing company doctrine" to which plaintiff refers? The answer from legislative history justifies an affirmative answer.

[fol. 91] Nor does the language of Section 18(c)(5)(B) support the thesis that agencies and courts in considering anticompetitive effects in bank merger cases are to be hamstrung by cold statistics and are not to be allowed to look

to the total facts in context to determine whether the statistics reflect the true competitive situation.

Mr. Justice Harlan, dissenting in the *Lexington* case, expressed the view that Congress in the Bank Merger Act of 1960 had plainly indicated that it did not intend that mergers in the banking field should be measured solely by the antitrust considerations which are applied in other industries. He further stated that adherence to the principles enunciated in *United States* v. *Columbia Steel Co.*, 334 U.S. 495,[4] "would leave room for an accommodation within the framework of the antitrust laws of the special features of banking recognized by Congress." Because of the ruling in *Philadelphia,* this accommodation was not [fol. 92] effectively accomplished by the 1960 Bank Merger Act, but the Court is persuaded that the accommodation to which Mr. Justice Harlan referred is the fundamental purpose and effect of the 1966 Amendment in providing that anticompetitive effects may be outweighed in the public interest by the convenience and needs of the community, and that consideration shall be given in every case to the qualitative banking factors specifically enumerated. These factors are sufficiently comprehensive in character not only to embrace the *Columbia Steel* criteria, but also to require an even broader scope of inquiry and analysis with respect to antitrust issues.

---

[4] These principles were stated in the Columbia Steel opinion as follows:

In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market. We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. The relative effect of percentage command of a market varies with the setting in which that factor is placed. At page 527.

The Court's construction of the 1966 Amendment is sup-

ported by the Amendment's provision that bank mergers shall be considered in the first instance by the responsible banking agency, applying the standards of Section 18(c)(5), by the requirement that courts shall apply identical standards, and by the provision that the Courts' role shall be limited to reviewing de novo the issues presented under the 1966 Amendment. If it was the purpose of the Amendment simply to perpetuate without modification the *Lexington* and *Philadelphia* antitrust criteria in the banking field, it is not apparent why Congress would have emphasized by these provisions the importance of the responsible agencies' expertise with respect to bank mergers. The structuring of the Act in this respect cannot be reconciled with the logic of the *Philadelphia* decision that courts must determine the validity of bank mergers on the basis of anti- [fol. 93] trust considerations alone—primarily derived from statistics—independently of and without regard to the special features of banking recognized by Congress. Whereas under the *Philadelphia* rationale, courts determined anticompetitive effect without regard to banking factors and banking agencies determined both, a balanced consideration of anticompetitive effects and banking factors is now enjoined upon both agencies and courts, the agencies speaking first and the courts reviewing "de novo" the issues presented.

Entertaining these views as to the thrust of the 1966 Amendment, the Court is of the opinion that while the plaintiff has established an arguable case for condemnation of the merger under the pre-1966 standards of the *Lexington, Philadelphia* and other cases, treating Davidson County as the relevant geographic market and commercial banking as the services or products market,[5] the merger is not vio-

---

[5] The Court rejects the defendants' and intervenor's argument that in assessing the anticompetitive effects of the merger the relevant geographic market is the broad area served by Third National's correspondent banking system. There is no significant legislative history to support the view that the 1966 Amendment was intended to change the relevant geographic market concept as developed in antitrust law. The Court is of the opinion under the facts of this case that the relevant geographic market is

to the total facts in context to determine whether the statistics reflect the true competitive situation.

Mr. Justice Harlan, dissenting in the *Lexington* case, expressed the view that Congress in the Bank Merger Act of 1960 had plainly indicated that it did not intend that mergers in the banking field should be measured solely by the antitrust considerations which are applied in other industries. He further stated that adherence to the principles enunciated in *United States* v. *Columbia Steel Co.*, 334 U.S. 495,[4] "would leave room for an accommodation within the framework of the antitrust laws of the special features of banking recognized by Congress." Because of the ruling in *Philadelphia*, this accommodation was not [fol. 92] effectively accomplished by the 1960 Bank Merger Act, but the Court is persuaded that the accommodation to which Mr. Justice Harlan referred is the fundamental purpose and effect of the 1966 Amendment in providing that anticompetitive effects may be outweighed in the public interest by the convenience and needs of the community, and that consideration shall be given in every case to the qualitative banking factors specifically enumerated. These factors are sufficiently comprehensive in character not only to embrace the *Columbia Steel* criteria, but also to require an even broader scope of inquiry and analysis with respect to antitrust issues.

---

[4] These principles were stated in the Columbia Steel opinion as follows:

> In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market. We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. The relative effect of percentage command of a market varies with the setting in which that factor is placed. At page 527.

The Court's construction of the 1966 Amendment is sup-

ported by the Amendment's provision that bank mergers shall be considered in the first instance by the responsible banking agency, applying the standards of Section 18(c)(5), by the requirement that courts shall apply identical standards, and by the provision that the Courts' role shall be limited to reviewing de novo the issues presented under the 1966 Amendment. If it was the purpose of the Amendment simply to perpetuate without modification the *Lexington* and *Philadelphia* antitrust criteria in the banking field, it is not apparent why Congress would have emphasized by these provisions the importance of the responsible agencies' expertise with respect to bank mergers. The structuring of the Act in this respect cannot be reconciled with the logic of the *Philadelphia* decision that courts must determine the validity of bank mergers on the basis of anti- [fol. 93] trust considerations alone—primarily derived from statistics—independently of and without regard to the special features of banking recognized by Congress. Whereas under the *Philadelphia* rationale, courts determined anticompetitive effect without regard to banking factors and banking agencies determined both, a balanced consideration of anticompetitive effects and banking factors is now enjoined upon both agencies and courts, the agencies speaking first and the courts reviewing "de novo" the issues presented.

Entertaining these views as to the thrust of the 1966 Amendment, the Court is of the opinion that while the plaintiff has established an arguable case for condemnation of the merger under the pre-1966 standards of the *Lexington, Philadelphia* and other cases, treating Davidson County as the relevant geographic market and commercial banking as the services or products market,[5] the merger is not vio-

---

[5] The Court rejects the defendants' and intervenor's argument that in assessing the anticompetitive effects of the merger the relevant geographic market is the broad area served by Third National's correspondent banking system. There is no significant legislative history to support the view that the 1966 Amendment was intended to change the relevant geographic market concept as developed in antitrust law. The Court is of the opinion under the facts of this case that the relevant geographic market is

lative of the new antitrust standards of the 1966 Amendment.

[fol. 94] The term "arguable case" is used for the reason that there are at least some conspicuous points of difference between the case at bar and *Lexington* and *Philadelphia*, whether or not such differences are of controlling significance. In the *Lexington* case, the Supreme Court held invalid under Section 1 of the Sherman Act the consolidation of the first and fourth largest commercial banks in Fayette County, Kentucky. Before the consolidation the largest bank, First National, had approximately 40% of the assets, deposits and loans in the relevant market which was determined to be Fayette County. The fourth largest bank, Security Trust, before the consolidation had approximately 12% of the assets, deposits and loans. After the consolidation, the new bank, First Security, had approximately 52% of the assets, deposits and loans. The bank established by the consolidation was larger than all of the remaining banks combined. In addition to these statistics reflecting "bigness," the Court relied upon the testimony from three of the four remaining banks that the consolidation would "seriously affect their ability to compete effectively over the years." It was concluded that the two banks before the consolidation were major com-

---

Davidson County. This is "where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." *United States v. Philadelphia National Bank, supra,* at p. 357. Also, on the clear preponderance of the evidence in this case the appropriate "line of commerce" by which to appraise the competitive effects of the merger is the cluster of products and services denoted by the term commercial banking. The Court does not agree that the omission of the words "in any line of commerce" from the 1966 Amendment is indicative of a congressional intent to reject "commercial banking" as a distinct line of commerce in appraising anticompetitive effects. It cannot be presumed that such an important change in established antitrust law would be made by mere omission. Again, there is really no significant legislative history to support the defendants' and intervenor's position on this point.

petitors and that the elimination of significant competition between them constituted an unreasonable restraint of [fol. 95] trade in violation of Section 1 of the Sherman Act. The statistics of the present case, of course, are not as impressive as those in *Lexington*. Third National, having approximately 33% of assets, deposits and loans before the merger, possessed approximately 38% in these categories after the merger. It was second in size before the merger and it retained the same position in the Davidson County market after the merger. The Trust Company's share of assets, deposits and loans before the merger was only approximately 5% as compared with the 12% of the smaller bank in *Lexington*. There is no comparable testimony in the present case from any of the remaining banks in Davidson County that the consolidation will seriously affect their ability to compete effectively. In *Philadelphia* a 30% market share resulting from the merger was regarded as undue, as compared with approximately a 38% market share in the present case; but in *Philadelphia* the merger resulted in a 33% increase in concentration between the two largest banks; whereas the increase in the present case between the three largest banks is approximately 5%. The *Philadelphia* merger formed a bank which became the largest in the market area; whereas, in this case, as pointed out, the new banking institution will continue to occupy second place. In *Philadelphia* neither of the banks involved had antitrust clean hands—the Philadelphia National having acquired nine formerly independent banks and Girard having acquired six, such acquisitions having extended over a long period of time into the recent past. In the case at bar, there is no significant merger his- [fol. 96] tory either with respect to the two banks or in the Davidson County commercial banking market.

Other differences could be pointed out, but it is clear to the Court that whatever the result in this case may have been before, the merger now under consideration does not run afoul of antitrust standards when evaluated in the terms of the 1966 Amendment, as the Court construes it.

The Trust Company was chartered in 1889. Its name was changed in 1956 to Nashville Bank & Trust Company. It opened its only branch in 1959. Prior to the change of

ownership in 1964, the controlling interest in the Trust Company had been owned by H. G. Hill, Jr. and his retail grocery chain operating in the Middle Tennessee area. The institution had been operated primarily as a trust company [6] with commercial banking occupying a place of secondary importance. In 1956 it brought in a former railroad executive, W. S. Hackworth, as president and began to emphasize the commercial aspects of its operation. During the period from 1955 to 1964 its assets, deposits and loans more than doubled, and its earnings record was good. This rate of growth, however, leveled off about [fol. 97] the year 1960. From that time until the merger with Third National its rate of growth was markedly less than that of any of the other banks in Davidson County. For the period 1956-60 its rate of growth in total assets was 46.55%, a figure which dropped to 20.32% for the period 1960-64. For the same periods the drop in deposits was from 50.58% to 18.77%, and the drop in total loans and discounts was from a percentage gain of 77.57% to 29.6%. Its percentage of total banking business in the market declined from 5.72% on June 30, 1960 to 4.83% on June 30, 1964.

The evidence demonstrates conclusively that the Trust Company, when considered as a commercial bank, has not been an innovator or an aggressive competitor. Its operations have been dominated by unaggressive and ultra-conservative management policies. At the time of the merger and for many years prior thereto it had a serious lack of

---

[6] The Trust Company had created and maintained what was for the most part a good trust department, an aspect of its operations which need not be discussed in detail herein. Trust departments, as the evidence shows, are operated primarily as a service to bank customers and are not an important lever in obtaining commercial business. While there is some direct competition for trust business in the market area between commercial banks having trust departments, such competition is minimal. The greatest area of direct competition for trust business is not with other banks but with individuals, such as lawyers. The loss of a trust account to a competitor bank is of infrequent occurrence.

managerial resources due primarily to the fact that its salary scale was wholly inadequate and it was without a funded pension plan for its employees. As pointed out by the Comptroller of the Currency in his decision approving the merger on August 4, 1964, "a bank is only as good as its management." At that time the 68 year old bank president was seriously ill and anxious to retire, having an illness which has since caused his death. H. G. Hill, Jr., Chairman of the Board, had sold the controlling interest in the Trust Company, owned by his grocery firm, the H. G. Hill Company, to William C. Weaver and associates, and [fol. 98] resigned from the bank's board of directors. Kirby Primm, the bank's only full time business solicitor, had resigned and taken a position with the First American National Bank, the largest bank in the market area. All three of these men had been key factors in the growth which the bank had enjoyed during Hackworth's tenure as president, and it is no exaggeration to say that so far as the Trust Company's commercial business was concerned they were practically irreplaceable. Much of the new business was brought to the Trust Company due to the formidable influence and personal business connections of Hill and Hackworth. Primm had been exceedingly resourceful in soliciting new business, particularly in capitalizing upon firms which did business with the Hill grocery stores. The decline in the bank's rate of growth is attributable in large measure to the loss of two of these individuals, to Hackworth's declining health, and to the lack of branch banks and other necessary facilities. In addition, both Hackworth and Primm testified that the Trust Company had reached a plateau and that they had gone as far as they could in bringing in new business by soliciting their friends and business connections. Hackworth described the bank's dilemma as follows:

> The earnings of Nashville Bank and Trust Company in the immediate past have been satisfactory. However, if the Nashville Bank and Trust Company made the expenditures necessary to bring it into a position to compete successfully and substantially in the Nashville area banking industry, such as additional branch banks, increased salary scale, automation, funded pension plan, employee welfare benefits and other related

> modern banking methods and procedures which have come to be necessary in order to render adequate and [fol. 99] modern service to the public, it is certain that its pattern of satisfactory earnings would not be maintained and such earnings might very well disappear.

The evidence demonstrates that the Trust Company management problem was one of serious proportions which made it practically impossible to attract and hold competent young men. It is significant that during his 17-year tenure at the Trust Company Primm's salary had increased by only 45% above a very low beginning, and that First American offered him an immediate salary increase of 60%.

The Trust Company's lack of dynamism and aggressiveness is demonstrated in many other ways. There had been no change in department heads from 1946 until the merger in 1964, a situation hardly calculated to interest young managerial leadership. Many of its officers and board members were old and the bank was in serious need of qualified young men as replacements. Although the Trust Company, due primarily to the personal business relationships of Hackworth and Hill, was able to grow substantially during the early years of Hackworth's tenure, no substantial or concerted effort was made to improve or modernize its methods, facilities, attitudes or personnel and management policies. For example, it consistently had the lowest loan to asset ratio of any bank in Davidson County, its loans being confined primarily to real estate and secured loans as distinguished from short term commercial loans. It operated without the benefit of credit files or a credit department. It employed no credit specialists. [fol. 100] In consequence it was not able to handle indirect consumer loans or the larger, more complicated credit situations. Its loss experience, particularly in recent years, had not been good. Its emphasis was consistently upon profits rather than upon making the expenditures necessary to place itself in a posture to be truly and significantly competitive. In addition to inadequate salaries, the lack of a funded pension plan and low fringe benefits, it failed to provide branches, the hallmark of modern banking. It had only one branch as of the date of the merger in the

Davidson County market in which there were 52 branch banking offices. Nor did it provide modern equipment, modernized banking quarters, or a continuous audit program. It was not a member of the Federal Reserve system and it had no regular customer call program.

Capital City Bank, on the other hand, which had only begun operations in 1960, and being less than one-fourth the size of the Trust Company, had established three branches. The Comptroller of the Currency was of the opinion that the Trust Company could have established from eight to ten branches in Davidson County if it had so desired. He stated that its failure to branch indicated that it was not disposed to make the needed struggle indicated for growth. Its failure to have any automated or computerized equipment stands in contrast with most other banks of its approximate size in Tennessee. There were many other indicia of negative and unprogressive manage- [fol. 101] ment policies, including its failure to remedy serious problems in the credit department despite warnings by the FDIC Examiner, its high proportion of criticized loans as reflected in FDIC reports, and its failure to hold any officer staff meetings since 1962.

Considering the Trust Company's problems, deficiencies and weaknesses, it is not difficult to understand the Weaver group's decision to merge with Third National rather than to undertake the formidable task of negotiating another sale, or the even more formidable task of solving the bank's many problems directly. The Weaver group had purchased the controlling stock in the Trust Company in the early part of 1964 as an investment. The members of the group had had no previous banking experience and none of them had planned to become members of the Board of Directors, or to devote their full energies and resources to rebuilding the bank. Fully realizing the extent of the bank's operational problems and difficulties only after the purchase, and realizing that the bank could not be revitalized as a competitive factor in the market without the expenditure of large sums of money, it was their conclusion that the best solution was to take the merger route.

In view of this attitude on the part of the new management, the Comptroller of the Currency correctly concluded in his decision approving the merger that "when a bank,

such as the merging bank, is not disposed to compete, it is idle to speak of the elimination of competition by reason of the merger.'" Despite its growth record in Hackworth's [fol. 102] early years as President, the future prospects of the bank at the time of the merger may be described as unpromising. While there is some conflict, the preponderance of the evidence is that it would have been practically impossible within any reasonable period of time to obtain adequate managerial replacements either from within the bank or from the outside, a product of the bank's failure to have adequate personnel and management policies, of its overly conservative attitudes, and of its failure to make the necessary expenditures to provide itself with the facilities, procedures and equipment required to maintain a competitive posture.

Only a brief word need be said concerning Third National and its position in the relevant market. There is no dispute in the record that it had been a strong, dynamic and aggressive bank since its organization in 1927. It was characterized by the Comptroller of the Currency in his testimony at the trial as one of the strongest and best managed banks in the nation. Of particular significance is the fact that its steady and impressive growth between 1927 and 1964 had been entirely the result of internal expansion, having no prior history of acquisition of assets by merger or consolidation. It had, in addition to its main office, some 14 branch offices in Davidson County. It has been active in the correspondent banking field, having approximately 365 correspondent bank accounts prior to the merger, most of which are located within a radius of 250 miles. Prior to [fol. 103] the merger in 1964, it had total deposits of $315,090,000.00 as contrasted with the largest bank, First American National, with deposits of $371,108,000.00, and Commerce Union, the third largest bank, with deposits of $202,624,000.00. At that time the Trust Company had total deposits of $45,471,000.00, occupying fourth place in the market. The fifth largest bank, which had entered the market only four years previously, Capital City, had deposits of $7,266,000.00. The other three banks in the market were the Bank of Goodlettsville with deposits of $6,369,000.00; Citizens Savings with deposits of $3,053,000.00; and Whites Creek Bank with deposits of $2,603,000.00. After the merger

all the Davidson County banks continued a substantial growth. As of June 1965, Third National had total deposits of $375,063,000.00; First American National had $393,040,000.00; Commerce Union had $219,514,000.00; and Capital City had $8,954,000.00. The remaining three banks had increased their combined deposits of $12,025,000.00 before the merger to $13,590,000.00.

When the general characteristics of the Davidson County market are considered, the plaintiff's insistence that the market is unduly concentrated appears to be lacking in significance. At the time of the merger all of the eight Davidson County banks had combined assets of slightly less than one billion dollars. In such a relatively small banking market it does not appear unreasonable that there should be a concentration of approximately 93% of combined assets [fol. 104] in three banking institutions, this figure being approximately 97% after the merger of the Trust Company and Third National. The record contains figures for comparable southeastern markets competitive with Nashville and having three major banks holding between 90 and 100% of the loan and deposit business. For example, Chattanooga has concentration among three banks of 100%; Mobile, Alabama, 98%; Birmingham, Alabama, 93%; Jackson, Mississippi, 98%; Memphis, 91 to 92%. The three largest cities in Tennessee—Memphis, Nashville and Knoxville—are now served by only seven banks, the largest number for any Tennessee city.

A meaningful fact in this case in that the Davidson County banks have attained their present market shares and size through internal growth and not through acquisition, a fact which is in marked contrast with the situation which prevailed in the *Philadelphia* case, as already pointed out. Another distinctive characteristic of the Davidson County market is that it is highly competitive at all levels, a fact which is clearly established by the preponderant testimony of competent and knowledgeable expert witnesses and by objective evidence of low service charges. Rivalry for business has always been exceptionally keen. The ease of entry is clearly indicated by the case of Capital City Bank which entered the market in 1960 and has had a substantial and continued success. There is no evidence of oligopolistic behavior in the relevant market. On the contrary, that

the Nashville banks are keenly competitive with respect to service charges, the solicitation of business, and in making changes and innovations is the only fair and reason-
[fol. 105] able conclusion which can be drawn from the record.

If the *Columbia Steel* factors, relegated to a place of relative unimportance in the *Lexington* case, are considered to have been restored to grace with respect to bank mergers by reason of the 1966 Amendment, and the Court is convinced that they were, and if the present case is accordingly analyzed in terms of such factors, it seems clear that the plaintiff's position in this case cannot be sustained. On the present record, only the *Columbia Steel* factors dealing with size can arguably be said to favor the plaintiff's position. It may be conceded for present purposes that the *dollar volume* and *percentage of business controlled* are significant. But the *strength of the remaining competition* is clearly established in this case by the assets, deposits and loans of the seven banks in the Davidson County market remaining after the merger, and by competent testimony of bank experts familiar with the market, that the remaining banks were active, vigorous and highly competitive. There is also convincing testimony that the merger has actually resulted in an intensification of competition among the Davidson County banks. Of importance in this connection, as already stated, is the fact that all banks since the merger have had substantial growth. The *motive* for the present merger was not predatory, but was based upon an evaluation of business and economic factors. A merger with Third National was determined to be the best solution to the grave problems confronting the Trust Company at the time of
[fol. 106] the merger. Without the merger these problems could not have been solved without drastic expenditures over a protracted period of time. Finally, the preponderance of the evidence in this case with reference to the *probable development of the industry, consumer demands* and *other market characteristics,* is highly favorable to the merger. The Davidson County market has had no merger history; there is no trend toward concentration; the service area is rapidly growing with consumer demands being on the increase and the market being recognized as one of the most highly competitive in the nation; the remaining

banks are well managed under vigorous and dynamic leadership; the Trust Company had reached a stagnant and deteriorating posture at the time of the merger, having critical managerial and other problems and deficiencies; the new owners were investors who were not disposed to make the sacrifices necessary to overhaul the bank so as to place it in a position to be substantially competitive with other banks; and actual or probable future oligopolistic behavior is contradicted by the record. This analysis, notwithstanding the concentration and market share figures upon which plaintiff relies, compels the conclusion that the present merger is not a transaction "in restraint of trade" and consequently not prohibited by Section 18(c)(5)(B) of the Federal Deposit Insurance Act, as amended by the 1966 Amendment, the analogue of Section 1 of the Sherman Act.

Similar considerations lead to the conclusion that the effect of the present merger will not be "substantially to [fol. 107] lessen competition or to tend to create a monopoly" in violation of Section 18(c)(5)(B) of the Federal Deposit Insurance Act, as amended by the 1966 Amendment, the analogue of Section 7 of the Clayton Act.

As already stated, no reliable extrapolation as to future prospects may safely be predicted upon concentration or market share figures alone. But considering the totality of facts as to the institutions involved and as to the relevant market, a conclusion that the merger may substantially lessen competition in the future is wholly unwarranted. Any other view would require the Court to close its eyes to facts which are far more convincing than any possible contrary conclusions which could be drawn from the market share or concentration statistics in this case.

The Court concludes that the Comptroller of the Currency's findings, made both before and after the passage of the 1966 Bank Merger Act, that the anticompetitive effects of the merger are minimal and that the merger is not violative of antitrust standards, is supported by the clear preponderance of the evidence in the record. As the Court is also of this view independently of the Comptroller's findings, and concludes that the merger does not violate the antitrust standards of the 1966 Amendment, it is unnecessary to inquire whether any anticompetitive effects are outweighed by the convenience and needs of the community.

However, the Court is of the opinion that the preponderance of the evidence supports the Comptroller's finding that the [fol. 108] convenience and needs of the community and the public interest will be far better served by Third National Bank with the additional assets which it acquired as a result of the merger than would be the case by maintaining the Trust Company as a separate institution. The Trust Company had simply reached a period of imminent deterioration. It was at the time of the merger a "floundering" bank, though not a failing one. It was no longer capable under its existing ownership and management, and with its existing facilities, procedures, and attitudes to serve the public on a competitive basis with other banks in the market area. It was more attuned to the Victorian age which gave it birth than to the competitive realities of 20th Century commercial banking.

The Court will presently enter and file with the Clerk detailed findings of fact and conclusions of law to implement and supplement this opinion. Pending such filing, entry of final judgment denying the relief sought by the complaint will be withheld.

Wm. E. Miller,
United States District Judge.

[fol. 109] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

Civil Action No. 3849

UNITED STATES OF AMERICA, Plaintiff,

v.

THIRD NATIONAL BANK IN NASHVILLE AND NASHVILLE BANK AND TRUST COMPANY, Defendants.

and

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, Intervenor.

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Entered December 16, 1966

In this action the Court filed its opinion on November 22, 1966. Pursuant to the concluding paragraph of said opinion, the following additional findings and conclusions are made and adopted to be taken and considered together with the said opinion as constituting the Court's findings of fact and conclusions of law in this action:

Findings of Fact

1. This is an action instituted by the United States of America under Section 4 of the Sherman Act, 26 Stat. 209, 15 U.S.C. 4, and under Section 15 of the Clayton Act, 38 Stat. 736, 15 U.S.C. 25, praying for injunctive relief to remedy and prevent alleged violations of Section 1 of the Sherman Act and Section 7 of the Clayton Act, both Acts as amended, developing from a merger of Third National Bank and Trust Company.

2. At the time of the merger and for many years prior thereto, Third National Bank and Nashville Bank and Trust [fol. 110] were each engaged in commercial banking in interstate commerce.

3. The Court has jurisdiction of the subject matter and of the parties.

4. Third National Bank in Nashville (hereinafter some-

times referred to as "TNB"), a banking association organized under the laws of the United States, with its principal place of business at 170 Fourth Avenue North, Nashville, Tennessee, having all of its branches in Davidson County, is a commercial bank offering a comparative full line of banking services.

5. TNB was chartered as a national banking association on July 14, 1927, and opened for business on July 18, 1927, with a capital of $600,000 and a surplus of $120,000; as a result of successive increases in its capitalization, TNB had a capital of $6 million and a surplus of $14 million, as of December 20, 1963.

6. As of June 30, 1964, TNB was the second largest commercial bank in Davidson County in terms of assets and in total deposits; it ranked first in total loans. In addition to its main office in downtown Nashville, TNB operated fourteen branch offices located throughout Davidson County.

7. Third National Company is an affiliate of TNB, not a party defendant. It is a Tennessee corporation chartered in 1929. The capital stock of the corporation is owned by three trustees who are principal officers of Third National Bank. The trustees hold this stock for the benefit of the stockholders of the Third National Bank. Third National [fol. 111] Company is engaged primarily in the business of making and servicing mortgage loans, a substantial number of which are sold to the general public, but also a substantial number are sold to the Bank either for its own account or as investments in trust accounts managed by the Trust Department of TNB. In most cases after loans are sold either to the general public or to the bank or to the Trust Department, the Third National Company continues to service these loans. Third National Company operates a mortgage loan department, making mortgage loans on improved real estate in Nashville, Tennessee. Its holdings consist of mortgages on institutional, commercial, industrial and residential property. TNB refers a considerable number of customers to the Third National Company when they either wish to purchase or receive a mortgage loan, but a number find their way to the Third National Company without bank referral. It is estimated that 80% of the volume of loans handled by Third National Company are either for the

Bank or for customers of the Bank. As of December 20, 1963, Third National Company was servicing 23 loans held by TNB having a value of $1,000,283.40; 39 loans owned by Third National Company having a value of $738,325.76; and 318 loans held by the Trust Department of TNB having a value of $4,540,877.24, for a total of 380 loans having a value of $6,279,486.40 which were directly or indirectly held by TNB. In addition, 569 loans having a value of $378,-746.20 were being serviced for investors.

8. In 1959 Third National Bank's Small Business Investment Company was chartered. Jointly owned by the Bank [fol. 112] and the Third National Company, this affiliate, but not a party defendant, provides financial assistance to worthy small businesses. As of the date of trial, this affiliate had assisted only customers of TNB although the funds, theoretically, were available to all businesses located in the Nashville area. This company is the only one of its kind located in the Nashville area.

9. Prior to the merger, Nashville Bank and Trust Company (hereinafter sometimes referred to as "NB&T", or "acquired bank"), a banking association organized under the laws of the State of Tennessee, with its principal place of business at 315 Union Street, Nashville, Tennessee, having a single branch in Davidson County, was the fourth largest commercial bank in that County in terms of assets.

10. NB&T was chartered as The Nashville Trust Company on July 6, 1889 and opened for business with capital of $250,000 on September 9, 1889. In 1900 a savings department was opened and a banking department which accepted checking accounts followed in 1901. NB&T had a capital of $1,633,300, a surplus of $1,700,000, and undivided profits of $1,028,546, as of December 20, 1963.

11. On May 8, 1956, an amendment to The Nashville Trust Company's charter was issued changing the name to The Nashville Bank & Trust Company. Since the Bank was founded originally as a trust institution, commercial banking activities have been emphasized only in comparatively recent years and have been confined primarily to the immediate community served.

[fol. 113] 12. Commencing with its change of name and the election of W. S. Hackworth ("Hackworth") to its Presidency, NB&T successfully developed public acceptance as a

commercial bank. By August 1964, NB&T was a medium-size commercial bank, the second largest state bank in Tennessee, offering some but not all of the banking services customarily available at such institutions.

13. As of September 30, 1963, principal holdings of the 16,333 outstanding common shares of NB&T among 73 stockholders were as follows:

	Shares
H. G. Hill Co.	9,845
H. G. Hill, Jr.	444
Mamie Wilson Hill	101
W. S. Hackworth	2,510

14. Despite a marked demand for NB&T stock and important efforts to buy into the Bank during several years preceding the merger, only a miniscule percentage of the Bank shares were available for purchase.

15. James J. Saxon, Comptroller of the Currency of the United States (hereinafter sometimes referred to as "Comptroller"), intervened as a party defendant, pursuant to the 1966 Amendment, by filing an answer in this action on March 8, 1966.

16. Products and services denoted by the term commercial banking include the following:

a. Creation of a media of exchange—resulting from the interrelation of credit extension and demand deposits;

[fol. 114] b. Deposit function—encompassing demand deposits, savings deposits, certificates of deposits and savings clubs;

c. Credit function—including real estate loans, commercial and industrial loans, loans for purchasing or carrying securities, loans to financial and eleemosynary institutions, loans to farmers, loans to individuals for personal expenditures (either single payment or installment);

d. Trust powers for personal and corporate trusts;

e. Safekeeping function—exemplified by escrow duties and safety deposit vaults;

f. Lines of credit—extended to important customers;

g. Collective function—exercised under drafts, bills of lading, etc.;

h. Correspondent banking facilities.

17. Commercial banks located within the Sixth Federal Reserve District may be classified according to deposits into three size categories, as follows:

a. Small banks, with deposits of less than $10 million;
b. Medium-size banks, with deposits from $10 to $50 million;
c. Large banks, with deposits over $50 million.

[fol. 115] 18. At the time NB&T merged with TNB, and for several years prior thereto, eight banks were located in Davidson County; six of these maintained their head offices in downtown Nashville.

19. The relative size and percentage participation of each of the commercial banks located in Davidson County, according to their Assets, Deposits, and Loans, on December 20, 1963, the last call date prior to public announcement of the merger, were as follows:

Bank	Assets		Deposits $ Millions		Loans	
First American National	$ 392.9	(38.9%)	$357.5	(39.4%)	$172.1	(35.6%)
TNB	339.5	(33.7)	304.1	(33.6)	175.2	(36.2)
Commerce Union	209.5	(20.8)	185.9	(20.5)	105.1	(21.7)
NB&T	47.3	(4.7)	2.1	(4.6)	21.4	(4.4)
Capital City	7.5	(0.7)	5.8	(0.6)	3.1	(0.6)
Bank of Goodlettsville	6.2	(0.6)	5.7	(0.6)	3.9	(0.8)
Citizens Savings	3.3	(0.3)	2.9	(0.3)	1.7	(0.4)
White's Creek	2.6	(0.3)	2.4	(0.3)	1.2	(0.3)
Total	$1,008.8	(100.0%)	$906.3	(100.0%)	$483.8	(100.0%)

20. Both NB&T and TNB were and remain disenabled by operation of State Statute from establishing or operating branches outside the borders of Davidson County.

21. All other commercial banks having main offices in Davidson County are likewise prohibited from establishing or operating branches outside that county with the exception of Commerce Union Bank which is permitted by State Statute to operate eight branches outside the county which it had created prior to enactment of the said legislation.

[fol. 116] 22. NB&T's head office, presently a branch of TNB, was located in the financial district of Nashville and its sole branch, now an office of TNB, was situated within the City about five miles from its center.

23. TNB's head office is located in the financial district of

Nashville and all fourteen of its branches prior to the merger were located in Davidson County, within an eight-mile radius of the head office.

24. The bulk of the IPC deposits of each commercial bank located in Davidson County originate for customers having residence and/or business addresses within Davidson County.

25. Between 83% and 92% of NB&T's IPC deposits according to number of accounts, originated from customers having their residence and/or business addresses within Davidson County.

26. The bulk of TBN's IPC deposits originate with customers having their residence and/or business addresses in Davidson County.

27. NB&T's operations and activities were confined almost entirely to Davidson County and this constituted the principal area for NB&T's effective solicitation of business; consequently, its competitive activities were primarily limited to that territory. All radio and television advertising purchased by NB&T during the years 1962 and 1963 was purchased from and carried by radio and television stations located in Davidson County.

[fol. 117] 28. TNB's operations and activities have been primarily concentrated in Davidson County except with respect to correspondent banking, an activity not widely engaged in by NB&T. Hence, Davidson County constituted the area of competitive overlap wherein the effect of this merger on such competition as existed between the merged institutions will be direct and immediate. All radio and television advertising purchased by TNB during the years 1962 and 1963 was purchased from and carried by radio and television stations located in Davidson County.

29. The decision of the Comptroller which approved this merger measured banking monopolization aspects in terms of the Nashville area or community.

30. The Application measures the territory for potential growth almost entirely in terms of economic outlook for Nashville.

31. The service area for banks other than TNB and NB&T located in Davidson County has been and is primarily bounded by the territorial limits of said County, except for eight branches of Commerce Union Bank which

are located outside the County. (This finding takes no account of correspondent banking.)

32. The factor of inconvenience localizes banking competition. Individuals and local businesses typically confer the bulk of their patronage on banks in their local community, finding it impracticable to conduct their banking business at a distance.

33. Metropolitan Nashville, considered as a banking community, is relatively isolated from other financial centers, [fol. 118] so that the innate localized nature of economical banking rivalry for customers restricts evaluation of the principal competitive effects flowing from this merger to banks located within Davidson County.

34. No concentrations of population exist in counties close enough to Davidson County capable of supporting banks with deposits in excess of $25 million, and with rare exceptions banks located in proximate counties have less than $5 million on deposit. The cities nearest to Nashville having populations in excess of 50,000 persons are located substantially beyond a radius of 100 miles.

35. Defendant banks and the Comptroller failed to introduce substantial evidence or to provide any definition of a precise area of competitive overlap, other than Davidson County, wherein the effect of this merger on competition will be direct and immediate.

36. Davidson County is the relevant geographic market within which to measure the anticompetitive effects of the merger of TNB and NB&T.

37. Within the expanded area of its correspondent banking activity, excepting Davidson County, TNB's services are largely restricted to its correspondent bank customers. These services include clearing checks, placing excess loans of its correspondents, allowing its correspondents to participate in loans originated by TNB, providing investment advice, providing temporary bank management, and many other services. The major function of the correspondent [fol. 119] relationship is to provide loan and deposit facilities to a country community greater than the banks located therein are capable of providing. TNB does not normally solicit IPC deposits, nor make loans directly to retail borrowers in the areas where its customer correspondents are located, but works through its customer correspondents

which originate the loans, any excess of such loans being furnished by TNB.

38. NB&T did not provide substantial or significant correspondent banking services and was not present in TNB's correspondent banking area. The correspondent accounts that it held were complimentary in nature.

39. Since NB&T did not participate in TNB's correspondent banking area, there was no competitive overlap therein.

40. Since TNB and NB&T did not compete with one another in TNB's correspondent banking area, such broader area would not be the appropriate relevant geographic market within which to measure the anticompetitive effects of the merger.

41. Considered collectively, the nature, variety, and scope of the cluster of products and services offered by commercial banks distinguish them as a "line of commerce."

42. No other type of financial institution offers the same products and services, collectively, as are provided by commercial banks, nor does any such institution offer any substantial combination of the several services provided by commercial banks.

[fol. 120] 43. Commercial banks in Davidson County perform many functions; of outstanding importance is the acceptance of deposits which includes demand, savings and time deposits. The making of commercial and individual loans, performing trust services, and providing safekeeping facilities are other primary functions. No other financial institution in Davidson County offers all of the services performed by the commercial banks.

44. Prior to the merger, both TNB and NB&T were commercial banks located in Davidson County offering commercial bank services, although the services offered by NB&T were more limited than those offered by TNB. "Commercial banking" means the aggregation of products and services in which commercial banks deal. The principal banking products are various kinds of bank credit such as unsecured personal and business loans, mortgage loans, loans secured by securities or accounts receivable, automobile installment and consumer goods installment loans, tuition financing, bank credit cards, and revolving credit funds. Banking services include acceptance of demand deposits from individuals, corporations, governmental agen-

cies, and other banks; acceptance of time and savings deposits; estate and trust planning and trusteeship services; lockboxes and safety deposit boxes; account reconciliation services; foreign department services (acceptance and letters of credit); correspondent service; and investment advice.

45. Demand deposits are the exclusive function of commercial banks. Ninety percent of the payments for goods, [fol. 121] services, etc., in the United States economy each year are made by checks drawn on commercial banks. Demand deposits are essential to the functioning of the economy.

46. In Tennessee there are no mutual savings banks, industrial banks, or factors.

47. Of all other types of financial institutions which defendant banks claim to be within the same products and services market as commercial banks, all but two offer only one of the multiple services provided by commercial banks. Credit unions and savings and loan associations provide a limited combination of the deposit and loan functions. Credit union deposit and credit functions are restricted to membership.

48. Savings and loan associations in Davidson County do not accept demand deposits, exercise trust powers, provide safe deposit facilities, extend lines of credit, issue certified officer bank checks, obtain government deposits, issue bank drafts or bills of lading, issue letters of credit, perform any check collection functions, or offer customers any foreign exchange service.

49. Savings and loan associations in Davidson County are limited primarily to the making of first mortgage loans within a one-hundred mile area of Nashville, Tennessee. The major portion of the mortgage loans made by these institutions are of 25-year duration and are made on personal residences.

50. Savings and loan associations in Davidson County are solicited for accounts by the new business personnel of the Davidson County banks, and they maintain demand deposits at these banks.

[fol. 122] 51. Considered severally, certain commercial banking products and services are distinctive to the point of

being entirely free of effective competition from the functions of other types of financial institutions; these include:

a. Creation of a media of exchange;
b. Demand deposits;
c. Exercise by corporations in Tennessee of trust powers;
d. Acceptance of time deposits and savings accounts from corporations and partnerships;
e. Short-term commercial credit on single or installment payments;
f. Safe deposit vaults;
g. Extension of lines of credit;
h. Correspondent banking;
i. Collections of drafts;
j. Foreign exchange;
k. Bank drafts;
l. Savings clubs (Christmas, vacation, etc.).

52. The deposit structures in commercial banks provide working capital at costs so low that such banks' products and services enjoy a cost advantage which insulate them, within a broad price range, from substitutes. When the average cost to a bank of various types of deposit services is struck and compared with costs normally incurred by other types of financial institutions for lendable funds, the obvious advantage to commercial banks is substantial.

[fol. 123] 53. There are banking services which, although in terms of cost and price, may be competitive with services provided by other types of financial institutions, nevertheless enjoy a settled consumer preference, insulating them from competition; habit, custom, personal relationships, convenience, and doing all banking under a single roof appear to be important factors in this regard.

54. A substantial number of financial institutions such as bank mortgage companies, finance companies, insurance companies, investment banking companies and security houses are good customers of TNB.

55. Measured in terms of the overall period June 1955 to August 1964, NB&T evidenced greater rates of growth, with regard to a number of major banking functions, than any other bank in Davidson County.

56. During the period from June 1955 to June 1964, total

assets of NB&T grew from $24,113,000 to $50,863,000 for a net increase of $26,750,000 or a percentage increase of 110.9%. During the same time period Total Assets of all commercial banks located in Davidson County underwent an increase from $548.3 million to $1,053.7 million for a net increase of $505.4 million or a percentage increase of 92.2%. The increase of Total Assets for NB&T exceeded the average for all commercial banks in the County by 18.7% and exceeded the rate of growth for TNB by 5.5%. On August 18, 1964, NB&T's assets were valued at $49,108,881.

57. During the four-year period from June 1955 to June 1959, NB&T's percentage increase of Assets was 53.6%. [fol. 124] Although the acquired bank's Asset growth during the second, equal period, i.e., from June 1959 to June 1963 was not as rapid, Total Assets did increase from $37,044,000 to $52,583,000 for a net gain of $15.5 million or a percentage increase of 42%. In terms of absolute dollar value, NB&T acquired $2.6 million more Assets during the latter part of the ten-year period. In the second period TNB's percentage increase of Assets was 47.7%.

58. Total Deposits of NB&T during the period from June 1955 to June 1964, grew from $20,796,000 to $45,471,000 for a net increase of $24,675,000, or a percentage increase of 118.7%. During the same time period, Total Deposits of all commercial banks located in Davidson County grew from $506 million to $946 million, for a net increase of $439 million, or a percentage increase of 86.8%. The increase of Total Deposits for NB&T exceeded the average for all commercial banks in the County by 31.9% and exceeded the rate of growth for TNB by 23.8%.

59. During the four-year period, from June 1955 to June 1959, NB&T's percentage increase of Total Deposits was 59.6%. Although the acquired bank's deposit growth during the equal period, i.e., June 1959 to June 1963 was not as rapid, Total Deposits did increase from $33.2 million to $47.5 million, with a percentage increase of 43%. In terms of absolute dollar value, NB&T actually acquired $1.9 million more deposits in the latter part of the ten-year period. During the same later period, TNB's percentage increase of Total Deposits was 47.3%.

[fol. 125] 60. Demand deposits (IPC) at NB&T, during the period from June 1955 to June 1963, grew from $10,-

289,000 to $19,135,000 for a net increase of $8,846,000, or a percentage increase of 85.1%. During the same time period, demand deposits (IPC) of all commercial banks located in Davidson County underwent an increase from $214,304,000 to $309,639,000 for a net increase of about $95 million, or a percentage increase of about 44.3%. The increase of demand deposits (IPC) of NB&T for said overall period exceeded the average for all commercial banks in the County by 40.8% and exceeded the rate of growth for TNB by 20.5%.

61. Total Loans and Discounts at NB&T, during the period June 1955 to June 1964, grew from $8,096,000 to $22,792,000, for a net increase of $14,696,000, or a percentage increase of 181.5%. During the same time period, Total Loans and Discounts of all commercial banks located in Davidson County underwent an increase from $228 million to $566 million, for a net increase of $338 million, or a percentage increase of 148.2%. The increase of Total Loans and Discounts of NB&T exceeded the average for all commercial banks in the County by 33.3%, and exceeded a rate of growth for TNB by 29.2%.

[fol. 126] 62. During the four-year period June 1955 to June 1959, NB&T's percentage increase of Loans and Discounts was 105.8%. Although the acquired bank's Loan and Discount growth during the second, equal, period, i.e., June 1959 to June 1963, was not as rapid, Total Loans and Discounts did increase from $16.6 million to $21 million, for a net gain of $4.4 million, with a percentage increase of 26.7%. This rate growth for the later four-year period was less than that of TNB by 26.8%. During NB&T's last five years loans increased substantially, achieving on all time high at the end of the period.

63. Earnings on Loans of NB&T, during the period from 1955 to 1963, increased from $394,000 in 1955 to $1,225,000 in 1963, for a net increase of $831,000, or a percentage increase of 210.9%. All commercial banks located in Davidson County had a percentage increase of Earnings on Loans, during this period, of 136.6%, while the percentage increase for TNB was 135.3%.

64. Total Current Operating Revenue for all departments at NB&T, during the period from 1955 through 1963, in-

creased in every year from $1,219,000 in 1955 to $2,348,000 in 1963, for a net increase of $1,129,000, or a percentage increase of 92.6%. During the same time period, Total Current Operating Revenue of all banks located in Davidson County underwent an increase from $14,606,000 to $32,-431,000, for a net increase of $17,825,000, or a percentage increase of 122%. The percentage increase of NB&T's Total Current Operating Revenue during this period almost doubled but was less than percentage increase of TNB [fol. 127] (130.1%) and the increase for all commercial banks in Davidson County. Net Operating Income Before Taxes at NB&T increased in every year from 1959 through 1963.

65. NB&T's Net Income After Taxes, during the period from 1955 through 1963, grew from $99,000 in 1955 to $368,000 in 1963, for a net increase of $269,000, or a percentage increase of 271.7%. During the same time period, Net Income After Taxes of all commercial banks in Davidson County increased from $2,060,000 in 1955 to $5,659,000 in 1963, for a net increase of $3,599,000, or a percentage increase of 174.7%.

66. As of June 30, 1964, the last call date prior to consummation of this merger, the relative size and percentage participation (according to Assets, Deposits and Loans) of each of the Banks in the County were, as follows:

Bank	Assets		Deposits $ Millions		Loans	
First American National	$ 407.2	(38.3%)	$371.1	(38.9%)	$185.3	(35.0%)
TNB	357.1	(33.6)	315.1	(33.0)	194.4	(36.7)
Commerce Union	225.5	(21.2)	202.6	(21.2)	115.9	(21.9)
NB&T	50.9	(4.8)	45.5	(4.8)	22.8	(4.3)
Capital City	9.1	(0.9)	7.3	(0.8)	3.6	(0.7)
Bank of Goodlettsville	6.8	(0.6)	6.4	(0.7)	4.3	(0.8)
Citizens Savings	3.4	(0.3)	3.1	(0.3)	1.8	(0.3)
White's Creek	2.8	(0.3)	2.6	(0.3)	1.4	(0.3)
Total	$1,062.8	(100.0%)	$953.5	(100.0%)	$529.7	(100.0%)

By October 1, 1964, the first call date after the merger, the relative sizes and participation were, as follows:

[fol. 128]

Bank	Assets		Deposits		Loans	
	$ Millions					
Third National Bank	$ 415.9	(38.7%)	$378.9	(39.0%)	$219.7	(40.3%)
Nashville Bank & Trust	MERGED		MERGED		MERGED	
First American National	410.0	(38.2)	372.0	(38.3)	195.6	(35.9)
Commerce Union	224.5	(20.9)	200.1	(20.6)	117.9	(21.6)
Capital City	9.9	(0.9)	8.1	(0.8)	3.9	(0.7)
Bank of Goodlettsville	6.9	(0.6)	6.4	(0.7)	4.5	(0.8)
Citizens Savings	3.4	(0.3)	3.1	(0.3)	1.8	(0.3)
White's Creek	2.9	(0.3)	2.6	(0.3)	1.5	(0.3)
Total	$1,073.8	(100.0%)	$971.2	(100.0%)	$545.0	(100.0%)

67. During 1965, TNB failed to maintain its paramount position with regard to Assets and Deposits. By the last call date in that year, First American had regained leadership with $462 million (38.7%) in Assets and $421 million (39.3%) in Deposits, as against $448 million (37.6%) in Assets and $397 million (37.1%) in Deposits for TNB. As to loans, TNB continued to be the leader with $253 million (38.3%), as against $249 million (37.8%) for First American. Commerce Union remained in third position under all three standards with about 22%.

68. According to the 1960 Census, Davidson County had a population of 399,743, an increase of 24.2 percent since 1950. The growth rate of the counties adjacent to Davidson County during this period was 9.6 percent, and the growth rate of the states of Alabama, Kentucky, Mississippi and Tennessee was 5 percent during this same period. The Nashville Area Chamber of Commerce estimated the 1963 population of Davidson County at 423,150.

69. The economy of Davidson County is based primarily on industry, finance, commerce and agriculture. Nashville as the capital of the State of Tennessee is a major govern- [fol. 129] mental center and the regional headquarters of several federal agencies. In addition, it is the headquarters of numerous educational institutions of higher learning and national religious organizations.

70. Non-farm employment totaled 144,800 in 1962, an increase of more than 55 percent since 1949. Of this total 27.8 percent was employed in manufacturing industry, 22.3 percent in trade, 15.9 percent in services and 14.5 percent in government at both the state and federal levels.

71. The future of Nashville is bright, and the future growth potential of the Nashville-Davidson County area is enhanced by numerous factors.

72. The need for capital in the Southeastern region and in the Nashville community is great. Because of capital requirements for economic development, this region must be an importer of capital for a long time and needs larger financial institutions all the time.

73. A large number of the major corporations in the Nashville area must seek their credit elsewhere due to the lending limits of Nashville banks.

74. Shortly prior to the merger, banks in Davidson County had the following banking offices: First American National Bank had eighteen; Third National Bank had fifteen; Commerce Union Bank had twelve (not including eight outside Davidson County); Nashville Bank and Trust Company had two; Capital City Bank had two; Citizens Savings Bank and Trust Company had one; Whites Creek Bank and Trust Company had one; and the Bank of Good-
[fol. 130] lettsville had one. Subsequent thereto and prior to May 10, 1966, First American opened three branches and Capital City Bank opened two branches.

75. The first duty of a bank is to provide adequate liquidity, and secondly, to make all sound commercial loans it can.

76. From a banking viewpoint, to make unsound loans eventually means liquidation and does not in any wise contribute to the community. It is not prudent for a commercial bank to carry a borrower beyond the bounds of reasonable safety.

77. A bank cannot lend money successfully except on the basis of informed judgment, and to assist in this judgment credit files are essential.

78. A particular bank exercise its money creation function as part of the entire banking system, acting under statutes and also under regulations of the Federal Reserve Board. This function is not performed on an individual competitive basis and cannot be viewed separately from the entire banking system.

79. On November 8, 1964, there were 290 commercial banks in Tennessee which were insured by F.D.I.C., with 227 banks having less than Ten Million Dollars in deposits, with 52 banks having deposits exceeding Ten Million Dol-

lars and not exceeding Fifty Million Dollars, and with 11 banks having deposits exceeding Fifty Million Dollars.

80. There are 218 cities and towns in Tennessee served by banks, of which 156 have only one bank, 50 have 2 banks, [fol. 131] 9 have 3 banks and 3, being Nashville, Knoxville and Memphis, have 7 banks each.

81. In Davidson County after the merger more than 97% of the deposits were in the three largest banks. Such concentration is not the result of prior mergers, but of healthy economic growth, and is not in and of itself a deterrent to the organization and growth of other banks.

82. Concentration figures taken alone are not a sufficient measure of competition, as all relevant facts pertaining to the institutions involved in the context of the particular market must be considered.

83. Cities in southeastern United States comparable in population and otherwise to Nashville have ratios of concentration of deposits and loans in the three largest banks similar to Nashville, as follows:

Chattanooga—100% of deposits, 100% of loans
Mobile, Alabama—98.14% of deposits, 98.67% of loans
Birmingham, Alabama—93.59% of deposits, 93.91% of loans
Memphis, Tennessee—92.26% of deposits, 91.27% of loans
Winston-Salem, North Carolina—90.08% of deposits, 89.57% of loans

84. The Nashville banking market manifests keen competition between the three largest banks and a lack of oligopolistic behavior on their part, evidence of which includes the following:

(a) The three largest banks have taken the lead in making changes and paying more interest on savings deposits. [fol. 132] (b) In charges for checking account service and in trust fees, the rates of the three largest banks are competitive, although they are computed by entirely different methods.

(c) The three largest banks have been innovators.

85. Service charges of banks in Nashville are among the lower ones in cities and banks examined, and service charges

of Third National Bank are lower than any of its major competitors.

86. Third National Bank is a full service bank offering a complete range of commercial bank services. Nashville Bank and Trust Company offered customers limited services and had not kept abreast with competing banks in numerous important areas.

87. As of December 31, 1965, more than sixteen months after the merger, Third National Bank continued to be second to First American National Bank, and its share of total deposits of banks in Davidson County had declined to about 37% as compared with about 38% at the time of the merger. First American's margin of deposits over Third National on April 5, 1966, was the greatest it had been since the merger.

88. (a) At the time of the merger, it did not appear its consummation would have any serious adverse effect on other banks in Davidson County.

(b) During the period between the merger and the date of the trial, banks in Davidson County, other than Third National Bank, have continued to grow and prosper. First American National Bank continued to be largest. Commerce Union Bank and Capital City Bank enjoyed their [fol. 133] year of greatest growth (1965), and other smaller banks have grown faster than ever before.

89. (a) The marginal borrower is likely to have no more than one bank connection, if any, and is very much limited to the bank where he has his only relationship.

(b) Qualified borrowers have many loan alternatives existing after the merger, both within and outside of commercial banking.

90. At Third National Bank, the authority of a branch bank manager to make loans of particular amount without approval from any one depends upon the size of the branch, the authority ranging from a few thousand dollars to a high of $25,000.00. There is competition between branch bank managers of Third National Bank, and on occasion a branch bank manager will make a loan that another branch bank manager has turned down.

91. Third National Bank has a history of innovating services or promptly providing new services.

92. Third National Bank has a regular recruitment program by visiting local universities to seek college graduates to enter its management development program. It also visits local high schools seeking out high school graduates to become clerks.

93. (a) Third National Bank uses a continuous audit program so as to have a continuous and daily audit con-
[fol. 134] trol of all cash, the interest income on all notes, interest income on all securities, all rental income, control of all investment assets of the bank, and continuous control of safe keeping of securities of the bank.

(b) Nashville Bank and Trust Company had very little of continuous audit program and such program is essential in a bank the size of this one. All national banks in this region with deposits of over $40,000,000 have continuous audit programs.

94. (a) Third National Bank has been very active in the field of correspondent banking, having approximately 365 correspondent bank accounts prior to the merger in August, 1964. Nashville Bank and Trust Company has functioned to a very limited extent as a correspondent bank.

(b) As of December 31, 1963, Third National Bank had 364 deposit accounts from correspondent banks aggregating sixty-six million dollars in amount, and Nashville Bank and Trust Company had 12 correspondent bank deposit accounts aggregating one million seven hundred thousand dollars in amount.

(c) Correspondent banking departments enable a bank to provide a wider and more effective range of banking services.

95. The correspondent bank balances which Nashville Bank and Trust Company obtained from smaller banks were complimentary and inactive, because to do an effective job as correspondent for smaller banks, it is neces-
[fol. 135] sary to be a member of the Federal Reserve System. Nashville Bank and Trust Company did not really have a correspondent bank department as such.

96. Participation loans by Third National Bank with correspondent banks increased by Three Million Dollars after the merger, and up to December 31, 1965, which was made possible as the result of more funds available for lending by reason of the merger.

97. A correspondent relationship is absolutely necessary to a small bank. The services of a correspondent are essential no matter which bank is conducting them. The larger bank provides a substantial number of services to its correspondent customer, including clearing of checks, investment advice, safekeeping services, extension of trust facilities, loan participations, handling of overlines, foreign banking services, if needed, and many others. The system enables individual communities to have access to more money than may be available within the community.

98. Without correspondent services, the smaller bank would have higher operational costs and some legitimate loan needs of the community would not be met.

99. The three larger banks in Nashville competed throughout the Central South with banks from Memphis, Birmingham, Knoxville, Chattanooga and Louisville, together with banks in New Orleans and St. Louis, for correspondents.

100. The few correspondent accounts held by NB&T were "complimentary and inactive."

[fol. 136] 101. The Nashville market is such that the failure of a bank located in the area to engage in correspondent banking demonstrates a lack of determination to do its job. A failure to compete in this area places a bank at a distinct disadvantage.

102. NB&T's lack of correspondents placed it at a disadvantage, as banks with correspondents received advance notice of new customers coming into the area. A bank without good correspondent relationships on the outside is in a very narrow position with regard to potential deposits. It cannot develop sufficient activity in many of its banking departments to justify going into newer type services and, generally, it cannot provide either the loan services or the effective utilization of resources in the community.

103. Although not legally required to do so, a bank has the responsibility, if it has the assets and personnel, to engage in correspondent banking.

104. NB&T could have engaged in correspondent banking had it been truly competitive. A $43 million bank in Birmingham has acquired $8 million in correspondent balances, and other banks in adjoining states, with $25 million in deposits each, have actively engaged in correspondent banking.

105. A major competitor in the Nashville market would compete in Northern Alabama for correspondents.

106. TNB, though 108th in size among this country's banks, was 58th in correspondent banking. This bank has attempted to meet every legitimate loan request from its correspondents which will meet a community need and [fol. 137] which will serve the economy of that area. As an example, one of TNB's correspondent customers recently received TNB's aid in a $950,000 construction loan, only $140,000 of which could be carried by the correspondent. Correspondent loans assisted this customer's county in the construction of roads and schools and in the operation of the county government.

107. In this same county, the correspondent system has enables the small bank to extend a $1,000,000 line of credit to five grain elevators, thus helping to expand its agricultural trade area. A recent loan from a correspondent resulted in the construction of a new retail store which will employ 300 persons. Other cities in nearby states benefitted similarly.

108. In 1965, the first full year after the merger, TNB sold $70,000,000 of participations to correspondents. On December 31, 1963, TNB had $66 million in correspondent balances. TNB had 364 correspondents at the end of 1963 in an area bounded by the Smokies on the East, Louisville to the North, Birmingham in the South and the Mississippi River on the West.

109. Nashville Bank and Trust Company did not lend its funds to the same extent as other Nashville banks. It had the lowest ratio of loans to deposits of any bank in the city; it had an unusually high percentage of its funds tied up in government bonds; and it had an unduly high percentage tied up in real estate mortgages which are frozen assets and which do not serve the community as well as the faster turning loans.

[fol. 138] 110. Among many services for smaller banks which Third National Bank renders as their principal correspondent are computer services.

111. Among important services not offered by Nashville Bank and Trust Company and offered by large banks in Nashville were: mobile home financing, correspondent bank facilities, purchase of dealer retail paper, convenience of branches, credit files and lending know-how, special check-

ing accounts and services of a small business investment affiliate.

112. The legal lending limit of Third National Bank as of December 20, 1963, was $2,000,000. The legal lending limit of Nashville Bank and Trust Company as of that date ranged from $654,000 to $1,090,000. In no instance has a loan of Nashville Bank and Trust Company come up to its conditional loan limit of 25%, and only in a few instances has such bank made loans which exceeded its unconditional statutory loan limit of 15%. Nashville Bank and Trust Company was not competent to handle loans of this size without relying upon another financial institution.

113. The merger increased the legal loan limit of Third National Bank by 20%, to $2,400,000, and over $40,000,000 of additional deposits were added to its resources, making available more funds to more borrowers.

114. The legal loan limit of a bank, if not adequate for particular lending purposes, may prevent that bank from being the lead bank in arranging loans. It is important for a bank to be the lead bank in arranging loans because [fol. 139] it can set the terms rather than having them determined by banks of another region, and interest and deposits are kept in the community rather than sent elsewhere.

115. (a) Mr. W. S. Hackworth, who became President of Nashville Bank and Trust Company in February, 1956, was the former President of a railroad, an individual of great ability, with a wide public following. He attracted considerable new business to the bank because of his popularity, wide connections and aggressive inclinations.

(b) After February, 1956, the growth of Nashville Bank and Trust Company (previously called Nashville Trust Company) was chiefly due to the efforts of W. S. Hackworth and the influence of H. G. Hill, Jr., coupled with active solicitation by Kirby Primm. Mr. Hackworth came very close to being an indispensable person to Nashville Bank and Trust Company.

116. It is estimated that approximately 30% of the deposits of Nashville Bank and Trust Company were attributable, directly or indirectly, to the Hill interests.

117. In November, 1963, Mr. William C. Weaver first entered into serious discussions with Messrs. H. G. Hill, Jr. and W. S. Hackworth relative to the possible sale of the

H. G. Hill Company's interest in Nashville Bank and Trust Company to Mr. Weaver.

118. Subsequently, in a letter to Hill and Hackworth dated January 11, 1964, Weaver set out the terms previously agreed to orally by which he would purchase from the H. G. Hill Company and Hackworth, 10,845 shares of [fol. 140] the capital stock of Nashville Bank and Trust Company at $350.00 per share, with a closing date no later than April 30, 1964. These terms were accepted by Hill and Hackworth with minor changes on January 14, 1964.

119. William Weaver and associates purchased the controlling stock of Nashville Bank and Trust Company as a long term investment and without any intention of becoming active in the management.

120. In early February, 1964, officials of Commerce Union Bank indicated to William Weaver that they were anxious to merge Nashville Bank and Trust Company with their bank, and conversations on the matter followed, with discussions being terminated in mid-February, 1964.

121. On or about February 12, 1964, at a gathering which preceded the National Life and Accident Insurance stockholders' meeting, Mr. Sam Fleming, President of Third National Bank, mentioned to Weaver that if he were considering the sale or merger of Nashville Bank and Trust Company to bear in mind that Third National Bank was interested in discussing the matter with him. On at least three separate occasions later that month, Fleming discussed the matter of a possible merger of Nashville Bank and Trust Company with Third National Bank. On March 4, 1964, Weaver attended a luncheon at Third National Bank at which Fleming outlined the terms of a possible merger of the two institutions. The following day at Weaver's request, Fleming addressed a formal offer to [fol. 141] purchase the Nashville Bank and Trust Company stock held by Weaver and his associates to Weaver.

122. On March 11, 1964, Weaver and his associates consummated the January, 1964 agreement with Hill and Hackworth, and received 10,845 shares of common stock of Nashville Bank and Trust Company in exchange for bank checks in the amount of $3,795,750.00.

123. On March 12, 1964, resolutions were adopted by the boards of directors of Third National Bank and Nashville

Bank and Trust Company approving the merger agreement of the same day between said banks.

124. The merger agreement provided, *inter alia,* for an exchange of 4½ shares of stock of Third National Bank for each share of stock of Nashville Bank and Trust Company.

125. On March 13, 1964, the merger was announced and it was consummated on August 18, 1964.

126. Mr. Kirby Primm left Nashville Bank and Trust Company on or about February 1, 1964, to join First American National Bank, after which he put concerted efforts on moving accounts from the Nashville Bank and Trust Company to First American. Prior to the announcement of the contemplated merger in March, 1964, Mr. Primm took to First American National Bank savings and checking accounts aggregating $1,298,000.00, the majority of which came from Nashville Bank and Trust Company. During a sixty day period the commercial accounts which he took were comparable to the checking accounts and savings accounts.

[fol. 142] 127. During the interim between the sale of the stock by the Hill Company and the consummation of the merger, the morale of the employees of Nashville Bank and Trust was adversely affected. Raiding attempts on both customers and key employees by First American National Bank and Commerce Union Bank were concentrated at a time following the resignation of Mr. Hill and the sale by Hill Grocery Company and Hackworth of the controlling stock to new ownership. Such conditions are typical in bank mergers and often result in an attrition of as much as 20%.

128. Messrs. H. G. Hill, Chairman of the Board, and L. P. Thweatt resigned from the Board of Directors of Nashville Bank and Trust Company on March 11, 1964, immediately prior to the transfer of the H. G. Hill Company stock to purchasers William C. Weaver and associates.

129. Mr. W. S. Hackworth, President of Nashville Bank and Trust Company, was 68 years of age in 1964, in ill health and desired to retire within the next two years. Prior to the merger, his health was so impaired that he was under the care of three physicians and daily visiting one of them

for treatment of an illness which has since caused his death.

130. Obtaining qualified officer personnel from the management level down is very difficult for a bank.

131. The age of its directors and officers, the loss of Kirby Primm and the impending loss of Mr. Hackworth, coupled with the fact that Messrs. H. G. Hill, Jr., Chairman, and [fol. 143] L. P. Thweatt had resigned from the Board of Directors immediately prior to the tranfer of the stock from H. G. Hill Company, presented an almost insoluble problem to the owners of Nashville Bank and Trust Company unless resort was had to a merger.

132. Messrs. H. G. Hill, Jr., W. S. Hackworth and Kirby Primm were key men of great value to Nashville Bank and Trust Company and their loss, or in one instance imminent loss, greatly impaired the ability of the bank to compete.

133. (a) The rate of growth of Nashville Bank and Trust Company during the early years of Mr. Hackworth's presidency, to-wit, 1956 to 1960, was good with respect to deposits, I.P.C. deposits, loans and income. Its rate of growth declined markedly thereafter and leveled off after 1960 so that this bank did not keep pace with the growth of the community, or of other Nashville banks, from and after 1961. From June, 1960, to June, 1964, Nashville Bank and Trust Company was the only bank in Davidson County to show an actual decline in I.P.C. deposits.

(b) I.P.C. deposits consist of checking accounts of individuals, partnerships and corporations, excluding savings or time deposits, governmental accounts and deposits of correspondent banks. I.P.C. deposits are considered an important yardstick by which to measure banks because they usually portray the smaller customers who deal with the bank from day to day.

134. Nashville Bank and Trust Company on or about June 30, 1960, reached a plateau on which it remained until [fol. 144] the date of the merger, and in this period it was a stagnant and floundering bank whose percentage of total banking business in Nashville declined from 5.72% on June 30, 1960, to 4.83% on June 30, 1964.

135. In the Nashville banking market it is not possible for a bank long to remain upon a plateau or to be stagnant,

because it must either go forward or after a while start going backwards.

136. The average salary per officer of Nashville Bank and Trust Company was lower than the average salary per officer of Third National Bank, of First American National Bank, and of Commerce Union Bank in Davidson County.

137. Salaries of Nashville Bank and Trust Company were low in comparison with banks of similar size in neighboring cities.

138. The average salary per employee of Nashville Bank and Trust Company was lower than the average salary per employee of First American National Bank, Third National Bank and Commerce Union Bank, and also lower than the average salary of employees of the four small banks in Davidson County. Fringe benefits at Nashville Bank and Trust Company were also lower than at Third National Bank.

139. A bank with below average salaries and without a funded pension plan would have difficulty obtaining qualified people from outside the bank and the filling of several important vacancies in a reasonable space of time would be extremely difficult.

[fol. 145] 140. The Board of Directors of Nashville Bank and Trust Company on January 1, 1964, consisted of thirteen members, of whom four were 75 years of age or older, nine were 65 years of age or older, and eleven were 63 years of age or older.

141. Of the six departmental heads at Nashville Bank and Trust Company, four were 65 years of age or older and the other two were 59 years of age.

142. An adequate replacement for Mr. Hackworth was not available at Nashville Bank and Trust Company. Its only officers, who by age, education and identity with the community might reasonably be considered to succeed Mr. Hackworth, had little or no experience in commercial banking, with experience only in trust matters.

143. Outside of its trust department, there were fifteen officers at Nashville Bank and Trust Company as of January 1, 1964. Twelve of these were above the age of forty, with an average age of slightly more than sixty years. Of three officers under the age of forty, only one (age 28) was a college graduate.

144. The source of most new trust business of banks is

from their commercial customers, and the operation by a separate institution of a trust business is doubtfully practicable under modern conditions.

145. (a) The fees charged for services by the trust departments of First American National Bank, Third National Bank, Commerce Union Bank and Nashville Bank and Trust Company were not identical because they were [fol. 146] computed on a different basis, but they were comparable and similar.

(b) Fees of its trust department are not too important for a commercial bank. For year 1963, the trust department of Third National Bank furnished the bank with 2.5% of its total income and with only 0.58% of its total net income; for 1963, the trust department of Nashville Bank and Trust Company furnished the bank with 11.5% of its total income and with 7.15% of total net income.

146. The greatest area of competition for trust business by banks is not with other banks but with individuals, such as lawyers. Banks compete with each other for trust business only to a small extent.

147. A certain amount of trust business is leaving the Nashville community for service by institutions in the North and East.

148. Out of a total of 871 appointments made in the Probate Court during the year 1963, all Nashville Banks combined provided only 69, or a total of 7.9%. The 69 appointments of Nashville banks were as follows: First American National Bank—28; Third National Bank—19; Nashville Bank and Trust Company—10; Commerce Union Bank—7; and other banks combined—5. Similar figures were revealed for 1964 and 1965.

149. In the solicitation of trust business branch banks are advantageous and their absence is a handicap.

150. There was a tendency in the Trust Department of Nashville Bank and Trust Company for young men to come in, stay a few years and leave for better jobs and better opportunities.

[fol. 147] 151. In the Trust Departments, there is no way to compare the profits of the two merging banks for 1963 because the accounting system and methods were different and departmental expenses were not on the same basis.

152. Although Nashville Bank & Trust Company's trust

department was generally regarded as good, the bank was specifically criticized by FDIC examiners in each of the reports on the performance of its trust department during the years 1960, 1961, 1962 and 1963. Several trusts had been subjected to criticism for a number of years prior to 1960, although the record is not clear as to the time of their inception. The 1962 report indicates that these criticized trusts, all of which were designated as repositories for perpetual care funds paid by cemetery lot buyers, were deficient in several respects.

153. One trust had a contingent liability because of the speculative investments which NB&T permitted to be placed in the account by the principals of the cemetery association. The 1962 report noted that little improvement had been effected in the administration of this trust primarily because of the heavy financial involvement of the particular concern the stock of which constituted one of the major assets of the trust, and which was controlled by the principal of the cemetery association. The involvement appeared to have grown worse.

154. A second trust, also a perpetual care trust, had also been criticized on earlier occasions by the examiners. NB&T management advised examiners that it had decided to re-[fol. 148] quire replacements of listed holdings with orthodox trust investments. This decision was not implemented, however. Subsequently, other speculative investments were knowingly permitted by NB&T. As a trustee, NB&T failed in its responsibility to make investments to provide the greatest possible yield. This account had not received any income on any scheduled [classified] speculative investments since its inception. The 1962 FDIC report noted that the vice president in charge of the trust department was remiss in improving necessary functional procedures necessary for a prudent operation. He was criticized for exercising little control over junior officers and for failing to delegate specific responsibilities. President Hackworth's knowledge of trusts was limited thus restricting him as an adviser. The management rating of 1962 was "fair."

155. The 1963 report indicated that potential losses in NB&T's trust department had substantially increased with potential losses and contingent liabilities continuing at unwarrantedly high levels. The conditions involved in situations such as that occurring in the cemetery trusts could

transcend the effect of legal liability because publicity which would accompany any reasonable claims by beneficiaries and particularly a group that had been sold burial rights with the assurance that NB&T, as trustee, was protecting their interest in the perpetual care fund would be more damaging than legal liability alone.

156. The cemetery trusts were criticized severely over several years with successive promises and programs of [fol. 149] correction put forward by NB&T management. Despite management's expressed concern over existing conditions, the criticisms by examiners continued to be severe; this fact lends strong support to the conclusion that either the matters were taken lightly by NB&T management or were not susceptible to correction. In 1963, NB&T had no audit controls over the trust department. Such a condition was regarded as highly hazardous.

157. The examiners note that there appeared to be sufficient technical proficiency for satisfactory operation of NB&T's trust department. However, it also noted that those improvements which had been effected had been confined to simple matters rather than substance and that the changes in criticized affairs between examinations were quite disappointing. The performance and conditions existing at the time of the examination fell far short of supporting the conclusion of technical proficiency. The management rating of "fair" was continued at the time of the 1963 examination.

158. According to the laws of the State of Tennessee, 25% of the proceeds of the sale of a cemetery lot must be placed in a perpetual care fund trust; in one such trust, distinct from the two previously discussed, the cemetery association withheld almost $70,000 of such proceeds in violation of the statute.

159. In addition to its allowing the cemetery to default in the payment of legally required funds, the trustee (NB&T) allowed the association to place four types of illegal investments in the trust. In this course the trustee acquiesced in the violation of law.

[fol. 150] 160. There were also nonconforming or illegal investments in two other perpetual care trusts held by NB&T.

161. Subsequent to the merger, the only criticized trust

assets in TNB's trust department were those which it had inherited from NB&T, i.e. cemetery perpetual care trusts.

162. Since the merger, TNB has recovered all of the funds which had not been paid in on a timely basis from the sale of cemetery lots. Moreover, TNB stopped the cemetery association from violating the law by continuing the practice of placing nonconforming investments in the trust and had "gone a long way" toward cleaning up the nonconforming investments which it had inherited at the time of the merger.

163. Depositors having deposits with more than one bank usually have a main banking account, with other accounts as complimentary or secondary in different banks.

164. Such deposits as large corporations had with Nashville Bank and Trust Company were split accounts, without a lot of activity and not requiring any particular work on the part of the bank to service them.

165. The fact that there were more than one thousand common depositors between Third National Bank and Nashville Bank and Trust Company indicates a lack of competition between them, especially in view of evidence that Third National Bank helped Nashville Bank and Trust Company obtain business.

166. Banks do not ordinarily compete with their smaller correspondent banks, and such calls as the larger banks make upon customers of the smaller bank are courtesy calls.

[fol. 151] 167. Nashville Bank and Trust Company maintained accounts in First American National Bank, Third National Bank and Commerce Union Bank, which was a deterrent to competition by these banks with the Trust Company.

168. Nashville Bank and Trust Company and Third National Bank differed substantially in that Nashville Bank and Trust Company was a local bank investing an unusually large share of its deposits in long term real estate mortgage loans and U. S. Government securities, while Third National Bank was a regional bank, servicing some 365 correspondent banks and operating strictly a commercial type bank with emphasis on faster turning commercial loans.

169. (a) Real estate loans were an insignificant part of the loans of Third National Bank and were a substantial

part of the loans of Nashville Bank and Trust Company. At the end of 1963, real estate loans constituted less than 1% of the loans of Third National Bank but constituted 35% of the total loans of Nashville Bank and Trust Company.

(b) A bank emphasizing real estate loans is competing with life insurance companies, savings and loan associations or other types of mortgage institutions. As to commercial banks, these loans are frozen assets, less stimulating to the economy than short-term commercial loans.

170. On the first call date after the merger, Third National Bank had a higher volume of loans than did both Third National Bank and Nashville Bank and Trust Company added together on the last call date before the merger.

171. A bank with lower loan to asset (or deposit) ratio than other banks in the community is not exerting its best [fol. 152] efforts to meet the credit needs of the community.

172. The ratio of total loans to total assets of Nashville Bank and Trust Company was consistently lower than that of the three largest banks in Nashville, the difference between Nashville Bank and Trust Company and Third National Bank being 40.9% as compared with 49.6%.

173. (a) Classified loans mean the substandard, doubtful and loss loans, and the ratio of classified loans to total loans is a valid measuring device.

(b) Classified commercial loans were 2.1% of total commercial loans for national banks in Tennessee of the size from Ten Million Dollars to Fifty Million Dollars at the time of the merger.

(c) In 1960 classified loans at Nashville Bank and Trust Company amounted to 3.4% of total loans. In 1961 the figure was 3.7%, in 1962 is was 7.3%, and in 1963 it was 6.8%. Nashville Bank and Trust Company had too much classified paper in the bank from the viewpoint of bank supervision, and its officers did not properly service their loans.

(d) When classified loans amount to as much as 20% of capital structure, some type of action or warning by the Examiner is indicated. Classified loans of Nashville Bank and Trust Company exceeded 20% of capital structure in both the 1962 and 1963 examinations, and there was an

unfavorable trend developing with respect to classified loans as disclosed by the recent reports of bank examiners to F.D.I.C.

174. The ratio of loan losses for Nashville Bank and Trust Company was 5.6% prior to the merger, while that [fol. 153] of Third National Bank was 1.6%. Reserves for bad loans are based upon the bank's actual expense in net loans.

175. Nashville Bank and Trust Company had no credit department, and such department is necessary to operate a competitive commercial bank.

176. Nashville Bank and Trust Company had only one small branch and one of its greatest handicaps was lack of branch banks, which are essential to effective competition.

177. (a) Adequate branch banks are an important element in serving the convenience and needs of the community, and a bank without adequate branches is not adequately serving the community.

(b) Branch bank managers get to know local people in local neighborhoods.

178. A substantial number of the former customers of Nashville Bank and Trust Company are now using other branches of the Third National Bank.

179. Bookkeeping, accounting and auditing procedures at Nashville Bank and Trust Company were inadequate as well as obsolete.

180. The offices of Nashville Bank and Trust Company needed substantial expenditure to renovate them.

181. If Nashville Bank and Trust Company had made the expenditures which needed to be made for the proper maintenance of the bank, its apparently good earnings record in the years immediately preceding the merger would have been substantially diminished by reason of expense of increased salaries, pensions and fringe benefits, [fol. 154] the installation of a satisfactory auditing department, the establishment of a credit department and automation or semi-automation, the renovation of banking quarters and the establishment of branch banks.

182. After Weaver and associates contracted to purchase the controlling stock in Nashville Bank and Trust Company they found many problems in the bank, the seriousness of

which had not been fully realized prior to the agreement to purchase. These included the management problem, the need for and difficulty of establishing branch banks, the providing of a funded pension plan and security program for officers and employees, and the complete lack of automation and of a computer.

183. Many inquiries made and information acquired by Weaver and associates regarding the problems of Nashville Bank and Trust Company, together with Mr. Weaver's discussion with Mr. Fleming, who proposed a merger of Nashville Bank and Trust Company with Third National Bank, convinced them that a merger with Third National Bank was the best solution to the problems and the best fulfillment of their responsibilities.

184. The merger was a business necessity for Nashville Bank and Trust Company because it was standing still and within a short time would begin to retrogress.

185. (a) The employees of Nashville Bank and Trust Company are better off under the management after the merger than they were under the old management.

[fol. 155] (b) Better conditions improved the morale of the employees of Nashville Bank and Trust Company, and improved morale resulted in better service to the public.

186. The Nashville banking market has acquired a reputation as, and is, one of the most highly competitive in the nation.

187. Competition between banks in Davidson County since the merger has been extremely active and is greater than it was prior to the merger.

188. (a) Third National Bank did not acquire by the merger an undue share of the market, its prior growth having been due to natural market forces, not mergers.

(b) The market share of Nashville Bank and Trust Company in Davidson County prior to the merger was only about 5%. This increment is not sufficiently large to have a substantial effect upon competition.

189. The merger did not result in a substantial lessening of competition and no such effect is probable.

190. One effect of the merger of Third National Bank and Nashville Bank and Trust Company upon competition was to produce a healthier, more progressive competitive market from the standpoint of better management and more dynamic leadership in the banking field.

191. Nashville Bank and Trust Company was not a modern banking institution and could not adequately serve the convenience and needs of its community.

[fol. 156] 192. The merger of Nashville Bank and Trust Company with Third National Bank resulted in greatly improved commercial banking services to the customers of Nashville Bank and Trust Company.

193. Nashville Bank and Trust Company was not a meaningful or substantial competitor in the Nashville banking community, and it competed only in a limited way with respect to certain types of loans and deposits.

194. Such limited competitive influence as Nashville Bank and Trust Company was able to exert during the administration of Mr. Hackworth was substantially eliminated by the sale of the controlling stock owned by Hill Grocery Company, the resignation of Mr. Hill, the departure of Mr. Kirby Primm and the illness of Mr. Hackworth. At the time of the merger, in its unsettled condition Nashville Bank and Trust Company and its personnel are aptly described as "sitting ducks" for other banks.

195. As shown by the decided preponderance of the evidence, the merger of Nashville Bank and Trust Company into Third National Bank clearly serves and meets the convenience and needs of Davidson County, Tennessee area, and such convenience and needs clearly outweigh in the public interest any anticompetitive effects of the merger.

196. The merger has especially served the needs and convenience of the Davidson County area in the following very important particulars:

(a) It has entirely solved the serious management and operating problems of Nashville Bank and Trust Company.

[fol. 157] (b) The legal lending limit of the resulting bank has been substantially increased, which provides more credit for businesses and employment for people in the community and the region.

(c) Seventeen banking offices are now available to present and future customers of Nashville Bank and Trust Company where only two were available.

(d) A fully automated operation, including two computers, has been made available to customers of Nashville Bank and Trust.

(e) A correspondent banking system covering a wide

area of the Central South provides customers of Nashville Bank and Trust with important contacts.

(f) Higher salaries, increased fringe benefits, better working conditions and a funded pension plan are provided for Nashville Bank and Trust personnel and their families.

(g) Special checking accounts and a wide assortment of savings plans are available to customers.

197. The merger also served the convenience and needs of the Davidson County area in these respects:

(a) The Nashville Bank and Trust building on Union Street has been remodeled and made more serviceable for the public.

(b) The Nashville Bank and Trust has received the benefits of membership in the Federal Reserve System.

[fol. 158] (c) Greater research facilities, better expertise in trust operations and management in depth have been made available to the trust accounts handled by Nashville Bank and Trust.

(d) Larger capital, surplus, and reserve basis, plus more stable and substantial earnings give better protection to Nashville Bank and Trust depositors and serve as a base to support further expansion.

(e) A small business investment affiliate chartered under the Federal Small Business Act, the first in Tennessee, gives added assistance to the small business customers.

(f) An experienced and extensive credit department will permit more intelligent handling of loan applications and will guard against undue credit losses.

(g) An efficient auditing department will assure better internal operations and give better protection against defalcations.

198. An application for approval to merge the two banks was filed with the Comptroller of the Currency on April 27, 1964.

199. The merger agreement received the approval of the Comptroller of the Currency on August 4, 1964. The approval was accompanied by a written opinion detailing the reasons for the approval.

[fol. 159] 200. On February 28, 1966, the Comptroller of the Currency intervened in this action as a party subject to the provisions of 12 U.S.C. 1828(c)(7)(D).

201. On June 9, 1966, the Comptroller of the Currency appeared as a witness before this Court, and on the basis of evidence introduced in the course of trial and information available to him, concluded that the anticompetitive effects of the merger were minimal and that any such effects were clearly outweighed in the public interest by the convenience and needs of the community to be served.

202. The rapid expansion of the economy in the area consisting of Tennessee, Northern Alabama and Southern Kentucky has created a need for greater accumulation of capital to service the industries and commercial establishments which have grown up in this area.

203. The Nashville area can be predicted, with some assurance, to undergo material growth with respect to both business and population in the years to come.

204. The growth of the area has created a substantial demand for capital which cannot be met by existing local or regional institutions.

205. As an example, fourteen of the 100 largest corporations in the country are located in the environs of Decatur, Alabama, which is one of the more dynamic growing areas of the Nashville market. Not one bank in the entire Sixth Federal Reserve District is large enough to meet the credit needs of any of these corporations. The Sixth Federal Reserve District includes East and Central Tennessee, Alabama, Florida, Georgia, Southern Louisiana, and Southern Mississippi.

[fol. 160] 206. This demand has resulted in the entire southeastern region, and the Nashville area specifically, becoming dependent upon imported capital, much of it coming from the financial centers of New York and Chicago.

207. The South, generally, is a capital deficit area.

208. Larger financial institutions contribute to an area's ability to meet its capital needs.

209. The capital shortage results in an area's dependence upon extremely large banks in money market centers such as New York and Chicago.

210. The inadequate size of local or regional institutions results in an inability of said institutions to act as lead or primary sources for credits.

211. The result of the importation of capital from such centers results in a drain of earnings, through interest payments, from the capital-short areas.

212. On December 20, 1963, the last date prior to the agreement to merge TNB and NB&T for which call reports on all Davidson County banks are in evidence, the following are statistics demonstrating total deposits, IPC deposits, and loans:

(in thousands)

	Total Deposits	Demand Deposits (IPC)	Loans
First American	357,513	138,653	172,081
Third National	304,100	112,493	175,219
Commerce Union	185,871	70,694	105,098
NB&T	42,085	18,612	21,424
Capital City	5,763	1,986	3,319
Bank of Goodlettsville	5,725	2,101	6,913
Bank of White's Creek	2,378	992	
Citizens Savings	2,929	1,112	3,946

[fol. 161] 213. The deposits of individuals, partnerships and corporations (IPC deposits) are more accurate indicia of a bank's position, as this figure excludes state and local deposits which are highly volatile.

214. It is possible for a bank to request temporary deposits from friends in anticipation of a call for a statement of condition (call reports) issued by the Federal bank regulatory agencies. Such a practice is known as "window dressing" and is for the purpose of making a bank's condition appear better than it is.

215. Of all Nashville (Davidson County) banks, only NB&T is known to have engaged in this practice.

216. The large proportion of the deposits and loans held by the largest three banks is the result of natural, competitive growth. TNB has never engaged in a merger, and NB&T had not been engaged in a merger for over thirty years.

217. On the dates listed the four largest banks in Nashville had the following percentages of the commercial bank assets in Davidson County:

	12/20/63	6/30/64	10/1/64	12/31/65
TNB	33.7	33.6	38.7	37.56
NB&T	4.7	4.8	*	*
Subtotal	38.4	38.4	38.7	37.56
1st American	38.9	38.3	38.2	38.75
Commerce Union	20.8	21.2	20.9	21.56
Total	98.1	97.9	97.8	97.87

[fol. 162] 218. The four largest banks in Nashville had the following percentages of commercial bank deposits in Davidson County:

	12/20/63	6/30/64	10/1/64	12/31/65
TNB	33.6	33.0	39.0	37.11
NB&T	4.6	4.8	*	*
Subtotal	38.2	37.8	39.0	37.11
1st American	39.4	38.9	38.3	39.31
Commerce Union	20.5	21.2	20.6	21.50
Total	98.1	97.9	97.9	97.92

219. On the dates listed the four largest banks in Nashville had the following percentages of commercial bank loans in Davidson County:

	12/20/63	6/30/64	10/1/64	12/31/65
TNB	36.2	36.7	40.3	38.31
NB&T	4.4	4.3	*	*
Subtotal	40.6	41.0	40.3	38.31
1st American	35.6	35.0	35.9	37.75
Commerce Union	21.7	21.9	21.6	21.79
Total	97.9	97.9	97.8	97.85

220. Prior findings demonstrate that Weaver and his associates decided to merge NB&T into TNB because of their inability or unwillingness to take an active part in the management of NB&T and that the various problems of NB&T would best be solved through a merger with Third National Bank.

221. The plaintiff introduced statistics to show that Nashville Bank and Trust Company enjoyed a greater rate of growth in the period 1955 to 1964 than did other banks in Nashville. These statistics demonstrated that assets of NB&T increased from $24 million in 1955 to $50 million in 1964; loans from $8 million in 1955 to $22.7 million in 1964; deposits from $20.7 million in 1955 to $45.4 million in 1964; [fol. 163] IPC demand deposits from $10.2 million in 1955 to $18.9 million in 1964.

222. The statistics also demonstrate that gross earnings of NB&T increased from $1.2 million in 1955 to $2.3 million in 1963.

223. Income of NB&T after taxes increased from $99,000 in 1955 to $368,000 in 1963.

224. The Court does not accept projected earnings for

1964 propounded by the plaintiff in GX 1011 and related testimony of witness Futoran because of the insufficient data upon which such projections were based. The plaintiff's economist who introduced these projections admitted that he was unaware of whether NB&T's accounting system was on a cash or accrual basis and admitted that he had no knowledge of the existence or nonexistence of provisions for bad debt reserves, Christmas bonuses or other nonrepetitive budgetary items in making his projections. The projections of future income contained in GX 1011 cannot be given any weight in these findings.

225. The plaintiff's statistics and the testimony of its economist demonstrate that NB&T's rate of asset growth showed a decrease of 55% in the years 1960 to 1964 as compared to the years 1955 to 1960 while every other Nashville bank showed an increase.

226. The plaintiff's evidence indicates an 87% decrease in the rate of growth of loans and discounts by NB&T in the period 1960 to 1964 as compared to the period 1955 to 1960.

[fol. 164] 227. During the comparable periods, all the small banks in Nashville as well as Third National Bank and Commerce Union showed a rate of growth increase in loans and discounts.

228. NB&T, according to plaintiff's exhibits and testimony, was the only bank in Nashville that showed a decrease in its rate of growth of deposits in the period 1960 to 1964 as compared to the period 1956 to 1960.

229. Differences in the growth rates with respect to assets, deposits, loans and discounts, and IPC demand deposits of Nashville banks between the periods June, 1956 to June, 1960 and June, 1960 to June, 1964 are reflected in the following table:

	Assets	Loans	Deposits	IPC Demand Deposits
Nashville Bank & Trust	−26.23	−47.71	−31.81	−63.17*
Third National Bank	+24.57	+ 9.51	+21.08	−19.47
First American	+21.54	+ 8.79	+24.89	− 2.50
Commerce Union	+ 8.25	+ 2.87	+12.94	+11.84
All other banks in Nashville	+18.11	+10.93	+21.36	+18.81

(Capital City excluded as it was not in existence in base period 1955-1960)

* NB&T was the only Nashville bank to show a dollar decrease in this category.

230. The importance of the IPC demand deposit figure was emphasized by the plaintiff in the presentation of its statistics. IPC demand deposits exclude deposits that come from other commercial banks, correspondent banks, govern- [fol. 165] mental bodies and political subdivisions; they also exclude savings and time deposits. The plaintiff used this figure in an attempt to determine the smaller customers of the bank; to eliminate areas where the large banks are competitive as in correspondent banking; and to reflect the activity by local and smaller customers and "the people that would be reached through advertising, the people that would deal day by day with the bank."

231. The government statistics and economists demonstrated that the IPC demand deposits of NB&T were $19.9 million in June, 1960; in June, 1964 they amounted to $18.9 million. At no time after June 1960 did NB&T's IPC demand deposits ever again reach the peak that they did in that year.

232. As contrasted to NB&T's decline in IPC demand deposits, the IPC demand deposits of every other Nashville bank grew during the period June, 1960 to June, 1964.

233. Despite the friendships and the Hill connections, NB&T had not kept pace with the growth of the community. Its growth leveled off after 1961 and had reached a plateau. The president had about exhausted the area from which he could obtain business.

234. The comparison of growth rates showed that NB&T was running downhill and that its "sins of omission" were beginning to tell. The rather substantial growth in the overall period was not too significant because of the very small base from which NB&T started. There was no prospect of sufficient growth in the reasonably foreseeable [fol. 166] future to permit NB&T to automate despite the fact that lack of modern equipment made it impossible to service the large accounts needed to enable the bank to grow.

235. The major competition in Nashville and Davidson County, among banks, was between the First American National, Third National and Commerce Union.

236. NB&T was a substantial correspondent customer of each of the three larger banks in Nashville. Its primary account was maintained at First American in amounts

ranging up to $2.5 million. It is probable that NB&T was First American's best customer.

237. In return for the substantial balance carried with First American, NB&T received out-of-town check clearing services, some credit advice, investment advice, transfers and assistance with bond issues.

238. At one time, NB&T was owned by First American; since its establishment as a separate entity it had been a correspondent of First American's. The relationship between First American and NB&T was one of helpfulness. The helpfulness included assistance to NB&T in obtaining accounts.

239. It was the practice of Nashville banks to refrain from competing actively with their correspondent customers.

240. Officers of First American National testified, however, that NB&T was active in the solicitation of accounts of First American. Much of the competition was in personal and auto loans, and most came from Hill, Hackworth and Primm.

[fol. 167] 241. The competition for direct auto loans between First American and NB&T was limited by the fact that the bulk of First American's auto loans were dealer paper rather than direct loans. The total amount of direct auto loans held by NB&T at the time of the last examination prior to the merger amounted to $2,077,418.46, or less than 10.3% of its outstanding loans.

242. In speaking of "meeting" NB&T in competition, the president of First American apparently meant that his bank called on NB&T customers in order to remain friendly in the event the relationship was dissolved.

243. Commerce Union encountered direct competition with NB&T in the direct small commercial loan business and for automobiles and other products. However, Commerce Union did not meet NB&T competitively as frequently as other banks and did not compete with NB&T for sizeable loans. Moreover, Commerce Union did not solicit NB&T accounts as actively before the merger because NB&T maintained a "nice" deposit with Commerce Union.

244. Third National Bank offered no significant or substantial competition to NB&T because NB&T was a good

customer of Third National's. Because of the relationship between the larger banks and their correspondent customers competition between them and NB&T was a one-way street. Most of the competition which did exist was for food accounts and these were frequently split between one of the larger banks and NB&T.

245. On occasions, Third National Bank would encourage its customers to place a complimentary balance in NB&T. [fol. 168] It was more important to a large bank to have NB&T carry a large balance with it than it was to compete with NB&T for some small loans.

246. This lack of competition between larger bank correspondents and the smaller banks is confirmed by the President of Capital City Bank who testified that the larger banks do not tend to take accounts away from smaller ones, and that Capital City does not consider Third National, its correspondent, a direct competitor.

247. The competition which did exist from NB&T in Davidson County was neither considered major nor significant. NB&T was not an innovator or a leader in the local banking market.

248. On one occasion, NB&T was given the opportunity to extend a credit of $500,000 to a large mortgage banking firm. Because of its lack of know-how, it was necessary for NB&T to seek the advice of another bank on how to handle the credit. NB&T never made any move to obtain any additional deposits or to extend any additional credit to this mortgage banker. As the mortgage banking industry is a substantial part of local financial picture, a major competitor would have had more interest in it.

249. The lack of the competitive atmosphere at NB&T was one of the causes of Kirby Primm leaving its employ. The bank had no competitive lending know-how and it [fol. 169] lacked the aggressiveness to compete in the highly competitive market. 60% of the officers of NB&T were over 57. Generally speaking, when men approach retirement age their aggressiveness decreases.

250. The disappearance of a competitor and the disappearance of competition are two different things.

251. The state banking superintendent and the Comptroller of the Currency each appeared on the stand and testified that in their opinion the merger did not and would

not result in a substantial or significant lessening of competition.

252. On at least three occasions NB&T advertised 5% direct loans on new cars. Nevertheless, it is uncontradicted at the time of the merger TNB possessed twice as many direct automobile loans as NB&T and approximately one-third of Commerce Union's automobile loans were direct. This plaintiff's witness also testified that anyone with good credit could obtain these same rates on direct automobile loans at any bank in Nashville.

253. In automobile lending the three largest banks in Nashville primarily emphasized indirect loans in their advertising. On the other hand, NB&T advertised strictly for direct automobile loans, and the president of the largest bank in Nashville testified that he knew of no instance in which NB&T dealt in an indirect automobile loan, although the last FDIC examination report showed a miniscule amount of such indirect paper.

[fol. 170] 254. Indirect automobile financing offers the customer the convenience of doing business with the dealer and also permits the extension of credit to those people which might be considered poor credit risks were they to deal directly with banks. The extension of such marginal credit is considered desirable economically by the plaintiff's chief economist.

255. If a bank is dealing only in direct consumer loans (1) either it does not want to increase its volume of consumer credit substantially or (2) it does not wish to acquire the specialized management necessary to handle the more complex problems of indirect lending.

256. There is no evidence or inference in the record of this case which would indicate that NB&T had ever granted a direct automobile loan to a customer who had been refused such loan by any other bank or competing financial institution.

257. As a result of the lack of branches, NB&T was sufficiently handicapped in the quest for customers that it offered services and extended credit when it was not justified. Such practices are "not economically sound."

258. A bank with an adequate credit department is in a better position to meet a marginal loan requirement than a bank without it. NB&T had no credit department. One of the major difficulties in banks, and particularly smaller

banks, is a failure to provide an adequate mechanism and personnel for the enforcement of loan provisions and their collection on maturity.

[fol. 171] 259. The greatest disservice a bank and its lending officers can do to a borrower is to carry them beyond the bounds of reasonable safety and get them in real trouble. NB&T did not have the depth of know-how in extending credit and in providing management and financial counselling and guidance to the borrower who needs it.

260. Unsound loans do not contribute to a community. To the contrary, the bank making such loans will ultimately fall into receivership with dire results to the community in which the bank exists. It would be contrary to any proper standard of bank management or bank regulation or supervision to sustain a position based on a supposed contribution to the community of the extension of unsound loans.

261. Unsound loans must ultimately threaten the solvency of a bank.

262. In some accounts, service charges at NB&T may have been lower than TNB. No actual account record is in evidence to demonstrate the number of instances, if any, in which NB&T's actual charges were less than TNB's. The plaintiff made no attempt to show relative costs. Larger IPC demand deposit accounts (over $1,000), presumably including business accounts, were responsible for 93% of the dollar value of TNB's demand deposits and 96% of NB&T's. The service charge differential noted by the plaintiff could have affected only 4% of NB&T's IPC demand deposits at most. The maximum amount in-
[fol. 172] volved, therefore, is $712,000. This would be insignificant.

263. An analysis of current checking account charges in 21 selected southern cities, many in the Central South and comparable in size to Nashville, shows the following uncontradicted facts:

Type of Account	High Charge City	Low Charge City	Avg. Customer chg. for all banks included	Nashville Rank	Nashville Charge	TNB Charge
Medium personal	$ 2.91	$ .40	$1.64	16	$1.08	None
Small personal	2.75	1.15	1.83	16	1.60	$1.40
Business	13.59	6.16	9.59	21	6.16	5.71

264. TNB's charges are below the averages for all banks and below the average of Nashville banks in all cases.

265. Nashville is a highly competitive market and provides consumer services at very realistic, reasonable, and low cost. That Nashville's service charges are among the lowest of southern cities would certainly be an indication of the degree of competition in Nashville.

266. Only one businessman was produced by plaintiff who had received a loan from NB&T after having been turned down by the three larger banks or by TNB. This customer's loan requirements are now being served by First American, despite a decline in his net worth during the period 1961-1964. At the time of his last refusal by TNB, the customer's debt was double his net worth.

267. One other businessman was turned down by First American and was granted a loan by NB&T. This customer was never turned down by Third National; to the contrary, he has had "quite a number" of loans from TNB.

[fol. 173] 268. The smaller banks in Davidson County have experienced substantial and steady growth since the merger. The presidents of Capital City and Bank of Goodlettsville have stated that the merger has not hurt their banks; the former has had its greatest growth since the merger.

269. The presidents of two larger banks have each testified that competition in Nashville is greater than it was prior to the merger.

270. The plaintiff produced no evidence to show that a single individual has been harmed in any fashion by reason of the concentration of banking business in Nashville or by the merger.

271. The average classification rate of all national banks in Tennessee on the examination closest to August, 1964, was 1.43%. TNB's .6% was a substantially better performance; NB&T's 6.9% substantially worse. The use of ratios of classified loans to total loans is a valid device to measure the performance or condition of a bank and is constantly used by regulatory authorities.

272. TNB's higher 1961 classification rate of 4.8% to 1.8% was immediately reduced at the time of the next examination.

273. The substantial increase in classified paper in NB&T between 1960 and 1963 indicated that a declining

trend had set in; one that had to be stopped or turned around.

274. Although TNB's loan volume was more than eight times greater than NB&T's, NB&T had more classified loans, by dollar value, than TNB did at the time of the [fol. 174] November, 1963 examinations.

275. Although NB&T had a broader base for the maintenance of bad debt reserves because of very substantial past losses, its classified loans in November, 1963 were 145.4% of its reserve for bad debts; this compared with TNB's 17.2%.

276. The classified assets as a percentage of capital structure of NB&T increased from 15% in 1960 to 27% in 1963. This is an indication of timidity on the part of management at best; weakness and ineptness at the worst. This increase compares with a decrease at TNB, during the same period, from 13.7% to 4.5%.

277. NB&T was rated as "satisfactory" in the 1960 and 1961 examinations. By 1962, the condition of the bank had changed to "Fair."

278. Although Mr. Hill was responsible for much of the business of the bank, he took only a part-time and non-aggressive interest in the management of the institution; he was not receptive to expeditious action or progressive ideas.

279. The president and the junior officers of NB&T were lenient in extending credit for the purpose of securing deposits; it was evident by 1962 that the loan portfolio was not being serviced. By 1962, the volume of criticized loans had increased substantially in every classification category. In addition, delinquent paper was high and technical exceptions numerous. The trend at the time was not favorable; the rating of the bank fell from "satisfactory" to "fair."

280. By November, 1963, there was no improvement in either the leniency of officers or in the previously criticized [fol. 175] improper servicing of NB&T's loan portfolio. The amount of criticized loans continued high. Reduction in previously criticized loans, although satisfactory, was largely offset by the addition of previously unclassified paper, further advances and newly-extended credits. The rating of the institution in 1963 remained "fair."

281. The condition of TNB throughout its reports since 1961 has been consistently noted as "good." Regulatory authorities found TNB to be an institution of highest quality in every respect. Its operations and credit department are highly efficient. It has a capable and fully implemented staff of lending officers whose reputation throughout the Eighth National Bank Region is well known. This bank has a very high capacity to serve the public need in its community and is a strong, highly regarded institution throughout the country, known for its strong leadership, management and board. It has shown a vigorous dynamism in expending its services to meet an ever growing business need and has followed a fairly liberal lending policy in seeking to provide the capital needs of the area it serves. Of the 200 largest national banks in the country, Third National Bank is one of the strongest and best managed.

282. The respective capabilities of Third National Bank and NB&T in the commercial banking area are graphically demonstrated by the fact that, since the merger, Third National Bank sustained a loss of $121,000 on NB&T loans which had been received as a result of the merger; the remainder of $1,462,000 of NB&T classified loans received [fol. 176] by TNB as a result of the merger are no longer classified due to their having been paid off or having been refinanced at some other institution.

283. The heart of the commercial banking business is commercial lending. Other activities, while of great importance, are all necessarily collateral to this essential function. This is the ultimate test of the effective capacity and competition of any commercial bank.

284. Prior to the merger, NB&T, because of the lack of a credit department, could not and did not engage seriously in commercial lending in the Nashville market.

285. NB&T had a higher proportion of government deposits to total deposits than Third National Bank or the average of all insured banks in Tennessee. This is an indication that fewer of NB&T's funds were utilized in business lending, consumer lending or traditional commercial banking functions.

286. Commercial lending is the reason for the existence of commercial banks. NB&T's commercial experience was somewhat limited. The head of the largest boot manufac-

turing company in the world, factories of which are located in five towns surrounding Davidson County, stated that he was unaware that NB&T was engaged in commercial lending until he became aware of this case. He had never been solicited by anyone from NB&T. NB&T's commercial banking department operated more as a sideline.

287. As of December 20, 1963, Third National Bank had a loan deposit ratio of 57.6% compared to NB&T's 50.9%. At the time of the November, 1963 FDIC examination, [fol. 177] NB&T had 39.6% of its approximately $21.5 million in loans in mortgages.

288. Subsequent to the merger, the mortgage paper was sold off by TNB and the funds are being utilized in the Nashville area in commercial lending. The higher loan ratio of Third National Bank was also applicable to the deposits obtained from NB&T.

289. The combination of the application of a higher loan-deposit ratio added approximately $2.8 million to the total funds available for commercial lending in the Nashville area. The use of the funds previously frozen in mortgage paper added $8.4 million to the total funds available for commercial lending. Between the two the merger directly resulted in $11.2 million being placed under commercial lending in the economy of the Central South.

290. A region grows because of the growth of small firms within the region itself. A small firm in Nashville which wishes to grow is definitely dependent upon funds available in Nashville. A commercial bank best assists the growth of a developing area such as Nashville through commercial lending.

291. Competition among all financial institutions in Nashville is keen. Competition among these institutions by banks centers around First American, Third National and Commerce Union. The creation of a bank closer to the size of First American was expected to increase competition. Competition in Nashville between commercial banks has increased significantly since the merger.

[fol. 178] 292. In a city the size of Nashville, it is expected that there would be more aggressive competition with three or four banks than with 20 or 30. The merger has resulted in a healthier more progressive market.

293. The Regional Comptroller of the Currency testified

that with the additional knowledge since the merger, his opinion was that the competitive effect of the merger would be much less than he had thought it would be before.

294. The Comptroller of the Currency testified that there would not as a result of the merger be a significant decrease in competition. On the contrary, the merger has been beneficial by providing an additional stimulus to the economy of this area and, to other institutions in Nashville without eliminating any substantial measure of competition. "The question is whether the absorbed institution was indeed an effective competitor. This is a question that could largely be answered in the negative." Such an institution (NB&T) sizewise and in terms of its emphasis in the lending of its money could not conceivably have been a competitive factor regionally.

295. The superintendent of banks of the Department of Banking, State of Tennessee, wrote two letters relating to the Third National Bank—Nashville Bank & Trust merger. DX-7 is written to Third National Bank and states:

> "The competitive factor in my opinion will not be lessened by the merger. This assumption is based on the evident competition which now and will exist between existing First American National Bank, largest Nash-[fol. 179] ville bank, The Commerce Union Bank, in third position, and Third National Bank, second in size, the surviving institution of the merger between themselves and Nashville Bank & Trust Company which holds a minor position in the field insofar as competition is concerned."

296. INX-8 in a letter written to the Regional Comptroller of the Currency, Memphis, Tennessee, by the superintendent of banks. This letter was written in response to a request from the Office of the Comptroller of the Currency as part of its regular procedure to determine whether a merger would be in the public interest. The letter states:

> "Nashville banking has been considered competitive over the years. The First American National Bank being the largest since the early thirties. The proposed merger could, in my opinion, increase competition as the consolidation would make the Third National Bank nearer the size of the aforesaid largest bank.

"Facts remain that the survivor of the merging institutions will still remain in second place as to size and the elimination of a small competitor will not be too important." (Emphasis supplied.)

297. Upon receiving an application to merge, the Regional Comptroller assigns the investigation of the application to an examiner. Reports are then made to the Comptroller by the examiner and the Regional Comptroller of the Currency. The report from the examiner in this case to the Comptroller states:

"Future growth and earnings of the commercial department is limited due largely to two factors; management and lack of branch facilities. Management is not aggressive, the senior officers are approaching retirement age and no provision has been made for succession. To effectively compete for the available banking business it is necessary to have an extensive branch system. This bank has only one branch in operation [fol. 180] and since all areas of the county are already well served with branches, suitable locations are almost prohibitively high in price, and since bank lacks the necessary capable personnel to staff branches, it would be very difficult to enter into a profitable branch program at this late date."

The report notes that NB&T is "becoming less and less a competitive factor," and, further, that "competition between banks in Nashville has always been keen." It was the examiner's conclusion that the consolidation "would have but little effect upon competition and would not create a monopoly" and that the reduction of the number of Nashville banks by one would not lessen competition.

298. The report of the Regional Comptroller of the Currency states:

"the Nashville Bank & Trust Co. has gone to seed and has not maintained a commercial banking growth pattern proportionate to the three largest banks in Nashville."

This report discussed NB&T's lack of adequate branches or sufficient capital to engage in a branching program. The Regional Comptroller further stated:

> "that the competition which exists between the two applicant banks, while having some adverse effect upon the local competitive picture, is not of sufficient gravity to overthrow the favorable banking factors which are readily apparent."

299. In personal testimony, the Regional Comptroller stated that his opinion at the time of trial was that the effect upon competition was much less than he thought it would have been at the time of the merger.

[fol. 181] 300. The following findings were made by the Comptroller on August 4, 1964 in approving the merger:

> (a) on competitive effect of merger:
>
> "While the cold statistics presented by the application may indicate at first blush that some competition now exists between the applicants and that it will be eliminated by this merger, closer analysis of the complete picture dispels this hasty conclusion. A bank's competitive force in its community depends greatly upon the attitude of its management and board of directors. To assess accurately competition between two banks, an effort must be made to weigh the aggressiveness, the capability, the experience and the desire of the management of each to compete. When, as in this case, we find that the management of the merging bank is more interested in insurance than in banking, has no desire to maintain the bank's relative standing in the banking community, and has made no effort to improve its internal operating procedures nor elevate the morale of its personnel through better salaries and an improved pension plan, we cannot realistically view it as a competitive bank. When a bank, such as the merging bank, is not disposed to compete, it is idle to speak of the elimination of competition by reason of a merger.
>
> "We would, indeed, be derelict in our responsibilities to protect the public interest in banking were we to impede effective management from assuming the responsibilities of a declining and leaderless merging bank."

(a) on convenience and needs of Nashville:

"Consummation of the proposed merger will improve the charter bank's ability to serve the convenience and needs of the Nashville public. It will be better able to meet the credit needs of its larger customers throughout the Nashville wholesale trade area. Automation will improve the operating efficiency for the benefit of the merging bank's customers. Increased salaries and other incentives such as the charter bank's pension plan will improve the morale of the merging bank's personnel. The more numerous banking services offered through the resulting bank's extensive branch system will better serve the needs of the merging bank's customers. Further, the assets of the merging bank will be pooled with those of the charter bank to be used [fol. 182] more efficiently in promoting the economic wellbeing of the people of the Nashville community, the wholesale trade area which it serves, and the mid-South region of which it is the center.

"In the light of all of the facts and circumstances here present, we are compelled to conclude that this merger application has met the statutory criteria and will promote the public interest. The application is therefore approved."

301. The following testimony in this case was given by the Comptroller of the Currency on June 9, 1966:

(a) on competitive effect of the merger:

(1) as to commercial banking industry in Davidson County:

"No [the merger has not caused a significant decrease in competition], I do not think so, and on the contrary I believe it has been beneficial by providing an additional stimulus to the economy, and indeed to other institutions here without eliminating any substantial measure of competition.

"I asked myself the question, in considering this merger whether—and since then—whether, and in what respect any member of the public has been denied credit

in any substantive sense which would otherwise be available.

"Has the scope or quality of credit services been increased or decreased?

"Has the public or any substantial segment of it been damaged by any showing of a reduction in the scope or quality of banking services, not merely in the credit area but in the fiduciary area, in the operating area, in the bond area, and bond services, in the area of other services offered by banks?

"In examining these things by a practical test, I failed to see and would like to see, if anybody can produce it, any substantial evidence of harm to any segment of the public. On the contrary, as I pointed out earlier in response to your question, I think for the reasons given it has been on the contrary publicly beneficial, and in a competitive and banking sense as well."

[fol. 183] (2) As to elimination of a competitor:

"In my opinion, Nashville Bank and Trust Company was not a major or effective competitor in Nashville."

(3) on the denial of loans to two businessmen:

[If two businessmen were denied loans at a larger bank but were successful in obtaining them at NB&T the effect of this merger on such competition would be] "none whatsoever."

(4) on the position of NB&T as a commercial bank in the Nashville market:

". . . since Nashville Bank and Trust was primarily a mortgage lender, obviously it was to that extent not directly competitive with the area of commercial lending as such. . . ."

(5) on the position of NB&T as a financial institution in the Nashville area and the Central South:

"Such institution size-wise and in terms of its emphasis in the lending of its money could not conceivably have been a factor regionally."

(6) on trust services:

"I think it [the merger] would be highly beneficial to the public in order to enable the resulting institution to provide more effective trust services through the entire range of such services to the public."

(7) generally:

"I do not so believe [that there has been a substantial lessening of competition as a result of the merger]. In fact, I believe that as a result of the acquisition of the resources of the Nashville Bank and Trust, the Third National Bank has been able to expand its loans, its loan capacity obviously, and of course with respect to its specific loans not only in terms of quantity but also in terms of the amount of such loans, the acquisition of these resources also provides a substantial additional base for loan expansion and of course an additional earnings capacity, and of course finally the additional protective base or cushion to provide and support expanded risk."

(b) on balancing:

"Q. I believe, sir, it's your testimony that the con- [fol. 184] venience and needs of the community to be served as a result of this merger clearly outweigh any anticompetitive effect that the merger might have had?

"A. Yes, sir, I believe this is plainly apparent in the presently outstanding loans of Third National Bank in its expanded trust and other services.

"Of course, the core of the commercial banking is commercial lending. . . . This is the . . . ultimate test of the effective capacity and competition of any commercial bank.

"In this respect, it must be said that this bank (TNB) has been a vigorous and dynamic servant of the public, not only to the benefit of the public, but to the benefit of the bank and its stockholders too, of course."

302. The findings and conclusions of the State Superintendent of banks, the National bank examiner, the Regional Comptroller, and Comptroller of the Currency as set forth in No's 293 through 301 above are supported by the pre-

ponderance of the evidence in this section which is clearly substantial in character, weight and value. There is no evidence or suggestion that any of such findings and conclusions were made arbitrarily, capriciously, or as the result of an abuse of discretion.

Conclusions of Law

1. The Court originally acquired jurisdiction under the Acts of Congress commonly known as the Sherman Act and the Clayton Act, and it now has jurisdiction under Section 18(c)(5) of the Federal Deposit Insurance Act, as amended on February 21, 1966, by an Act "To establish a procedure for the review of proposed bank mergers so as to eliminate the necessity for the dissolution of merged banks, and for other purposes."

2. In the Act of 1966, bank mergers are recognized as *sui generis* and not to be tested by the same standards as mergers generally.

3. Under the Act of 1966, the regulatory banking agency is not to approve a bank merger whose effect may be sub- [fol. 185] stantially to lessen competition, or to tend to create a monopoly, or to be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

4. Under the Act, the regulatory banking agency in determining anticompetitive effects, must take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

5. Under the Act, the standards applied in a judicial proceeding to review are identical with those that the banking agency is directed to apply, and these standards are the substantive rule of law applicable here.

6. The rule that where concentration is already high even slight increases should be prevented has a limited application with respect to mergers under the Bank Merger Act of 1966, which requires consideration by the regulatory agency and by the courts of the special factors enumerated in the Act. Such consideration may require approval of a bank merger notwithstanding such rule.

7. The merger of Third National Bank and Nashville Bank and Trust Company is not a combination in restraint of trade in commercial banking in the Nashville metropolitan area (Davidson County, Tennessee) in violation of the Bank Merger Act of 1966.

[fol. 186] 8. There is no reasonable probability that the merger of Third National Bank and Nashville Bank and Trust Company may substantially lessen competition or tend to create a monopoly in commercial banking in the Nashville metropolitan area (Davidson County, Tennessee) in violation of the Bank Merger Act of 1966.

9. Nashville Bank and Trust Company was not a substantial competitive factor in the Nashville banking market and its elimination by merger did not constitute a substantial lessening of competition within the meaning of applicable antitrust laws set forth in the Amendatory Act of 1966.

10. The merger of Third National Bank and Nashville Bank and Trust Company was procompetitive in its effect, and not anticompetitive, in that the remaining three largest banks increased their competition with each other to an extent of sufficient substance to offset the elimination of the merged bank, no remaining bank has had its ability to compete impaired, and the public interest was served.

11. The anticompetitive effects of the merger of Third National Bank and Nashville Bank and Trust Company are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the Nashville metropolitan area (Davidson County, Tennessee).

12. The preponderance of the evidence in the action (such evidence being substantial) supports the Comptroller's findings that the merger (a) is not violative of the antitrust standards of the 1966 Amendment, and (b) that [fol. 187] any anticompetitive effects of the merger are clearly outweighed in the public interest by the convenience and needs of the community to be served.

Other conclusions of law and findings of fact are as set forth in the Court's opinion filed November 22, 1966.

WM. E. MILLER,
United States District Judge.

[fol. 188] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

Civil Action No. 3849

UNITED STATES OF AMERICA, Plaintiff,

v.

THIRD NATIONAL BANK IN NASHVILLE AND NASHVILLE BANK AND TRUST COMPANY, Defendants.

and

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, Intervenor.

JUDGMENT—Entered December 16, 1966

In this action pursuant to the Court's Opinion filed on November 22, 1966, and its Findings of Fact and Conclusions of Law filed on December 16, 1966, it is hereby ordered and adjudged:

That the relief sought by the complaint be, and the same is hereby, denied, and that the plaintiff's action be, and the same is hereby, dismissed.

The said Opinion and Findings of Fact and Conclusions of Law shall be taken and considered together as constituting the Court's findings of fact and conclusions of law in this action.

Each party shall bear its own costs.

WM. E. MILLER,
United States District Judge.

[fol. 189] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

Civil Action No. 3849

UNITED STATES OF AMERICA, Plaintiff,

v.

THIRD NATIONAL BANK IN NASHVILLE AND NASHVILLE BANK AND TRUST COMPANY, Defendants.

and

WILLIAM B. CAMP, ACTING COMPTROLLER OF THE CURRENCY, Intervenor.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed February 10, 1967

I. Notice is hereby given that the plaintiff, the United States of America, hereby appeals to the Supreme Court of the Unted States from the final judgment entered in this action on December 16, 1966, denying the relief requested by the plaintiff and dismissing the action.

This appeal is taken pursuant to 15 U.S.C. 29.

II. The clerk will please prepare a transcript of the entire record in this cause for transmission to the clerk of the Supreme Court of the United States, including therein all papers filed with the Clerk of the Court in this proceeding, the transcript of the trial proceedings, all exhibits submitted by the parties, and this notice of appeal.

III. The Questions Presented.

The United States brought this action to enjoin the proposed merger of the defendant banks. Under the Bank Merger Act of 1966, 80 Stat. 7, amending 12 U.S.C. 1828(c), the court is directed to enjoin such a merger if it finds that the merger's "effect in any section of the country [fol. 190] may be substantially to lessen competition, or tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the

anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." Using a standard different from that set forth by the Supreme Court in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, the district court has found that the probable effect of the merger was not substantially to lessen competition. In the alternative, the court has found supported by substantial evidence the finding of the Comptroller of the Currency, as presented by the Comptroller during the course of the trial, that any anticompetitive effects of the merger are clearly outweighed in the public interest by the probable effect of the merger in meeting the convenience and needs of the community to be served.

The questions presented here are (1) whether a court, in deciding whether a bank merger's effect "may be substantially to lessen competition" when it applies the 1966 Bank Merger Act, should follow the standards enunciated by this Court for interpreting those words as they appear in Section 7 of the Clayton Act; (2) whether a court in an antitrust action involving a bank merger should independently determine whether a merger's anticompetitive effects are clearly outweighed by considerations of community convenience and needs or should merely review the banking agency's determination as to that issue to ascertain whether it is supported by substantial evidence; (3) whether a court may determine that a merger's beneficial effects in serving community convenience and needs clearly outweigh significant anticompetitive effects when there may be less anticompetitive ways to achieve the same [fol. 191] community benefits; (4) whether the standards that the court indicated may properly be used to determine that considerations of convenience and needs clearly outweigh a merger's anticompetitive effects are correct.

James L. Minicus, Attorney, Department of Justice.

[fol. 192] Certificate of Service omitted in printing.

[fol. 193] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1966

No. 1259

UNITED STATES, Appellant,

v.

THIRD NATIONAL BANK IN NASHVILLE, et al.

Appeal from the United States District Court for the Middle District of Tennessee.

ORDER NOTING PROBABLE JURISDICTION—June 12, 1967

This case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

Mr. Justice Fortas took no part in the consideration or decision of this case.